

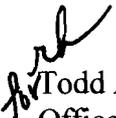


UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MARYLAND 20814

**Memorandum**

Date: May 22, 2009

TO : Office of the General Counsel  
Office of Hazard Identification and Reduction

FROM :  Todd A. Stevenson, Director,  
Office of the Secretary

SUBJECT : **Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108;**  
Published in the *Federal Register* February 23, 2009  
Comments due March 25, 2009

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
1	12/05/08	Alan R. Klestadt & Tracey Topper Gonzalez (submitted on behalf of Speedo USA)	Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP
2	2/10/09	Steve Pfister Senior Vice President Government Relations	National Retail Federation Liberty Place 325 7 <sup>th</sup> Street, NW, Ste 1100 Washington, DC 20004
3	2/13/09	Sarah Natividad	<a href="mailto:sarah.natividad@gmail.com">sarah.natividad@gmail.com</a>
4	2/13/09	Judy Elizabeth Reid	Box 6 Babb, MT 59411
5	2/13/09	Paul Crosby President	The Chichester Group 3044 Bloor Street West Suite 305 Toronto, Ontario M8X 2Y8 Canada

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
6	2/13/09	Larry Buchtman VP – Technology	Acme United Corporation 701 S. Wilson Street Fremont, NC 27830
7	2/16/09	Peter Baldes Vice President	Wagar Associates, Inc. 51 Industrial Park Road Sterling, CT 06374
8	2/16/09	Connie Hayes	<a href="mailto:lchayes3@verizon.net">lchayes3@verizon.net</a>
9	2/16/09	Dodie Winstead	<a href="mailto:Dodiewinstead@comcast.net">Dodiewinstead@comcast.net</a>
10	2/16/09	Esther Ziol	<a href="mailto:aesez@aol.com">aesez@aol.com</a>
11	2/16/09	Michael Zhang Project Manager	QAICHINA Quality Services Co., Ltd.
12	2/13/09	C. Resor	P.O. Box 667 Wilson, WY 83014
13	2/13/09	Kenneth T. Bogen	Exponent, Inc. 500 12 <sup>th</sup> St., Suite 220 Oakland, CA 94607
14	2/17/09	Dick Liou	AeroBlocs, a Division of Tinker Minds, Inc.
15	2/17/09	Emily Anderson	Before It Was Yours... <a href="mailto:Eanderson50310@aol.com">Eanderson50310@aol.com</a>
16	3/03/09	Bill Dunbar President	Orca Coast Playground Ltd. Vancouver, Canada
17	3/03/09	David and Hilary Crandall	<a href="mailto:crandallquiver@q.com">crandallquiver@q.com</a>
18	3/04/09	Michael J. Gidding	Brown & Gidding, P.C. Attorneys At Law 3201 New Mexico Ave., NW Suite 242 Washington, DC 20016-2756
19	3/05/09	Gary Lawson	<a href="mailto:GLawson@GENFOAM.COM">GLawson@GENFOAM.COM</a>

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
20	3/02/09	Robert Burns General Counsel	Trek Bicycle Corporation 801 West Madison Street Waterloo, WI 53594
21	3/09/09	Suzanne Anderson	Plymouth, MA
22	3/09/09	Chris Kalberer Fitness & Fun Coordinator	just jump it 4345 Hedstrom Way Chico, CA 95973
23	3/09/09	Karen Blum Boateng	Little Gems Jewelry
24	3/10/09	Carol Pollack-Nelson	Independent Safety Consulting 13713 Valley Drive Rockville, MD 20850
25	3/11/09	Andrea Lee Shuey	<a href="mailto:leeshuey@yahoo.com">leeshuey@yahoo.com</a>
26	3/13/09	Frances K. Wu Associate General Counsel	Personal Care Products 1101 17 <sup>th</sup> Street, NW Suite 300 Washington, DC 20036-4702
27	3/14/09	Jonathan and Heather Hunsaker	6610 23 <sup>rd</sup> St., NE Tacoma, WA 98422
28	3/17/09	Richard H. Wolkin Vice President	Colgate Mattress Atlanta Corp.
29	3/17/09	Peter T. Mangione President	Footwear Distributors and Retailers of America (FDRA) 1319 F Street, NW, Ste 700 Washington, DC 20004
30	3/18/09	Denise R. Calabrese Executive Director	International Play Equipment Manufactures Association (IPEMA) 4305 North Sixth St., Ste. A Harrisburg, PA 17110
31	3/20/09	Geoff Jones	<a href="mailto:geoffreysjones@yahoo.com">geoffreysjones@yahoo.com</a>

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
32	3/23/09	Gerald B. Horn	Sandler, Travis & Rosenberg, P.A. Attorneys At Law 551 Fifth Avenue New York, NY 10176
33	3/24/09	Carol Logan	<a href="mailto:carol@carolgracedesigns.com">carol@carolgracedesigns.com</a>
34	3/24/09	Daniel J. Coplan	Sheldon Mak Rose & Anderson Attorneys 100 East Corson St., 3 <sup>rd</sup> FL Pasadena, CA 91103-3842
35	3/24/09	Caroline Cox Research Director	Center for Environmental Health 2201 Broadway, Suite 302 Oakland, CA 94612
36	3/24/09	Andrew C. Fish Senior Vice President Legal and Government Affairs	Consumer Healthcare Products Association 900 19 <sup>th</sup> Street, NW Ste 700 Washington, DC 20006
37	3/24/09	Robert T. Stack Esquire	Tompkins & Davidson, LLP Five Hanover Square 15 <sup>th</sup> Floor New York, NY 10004
38	3/24/09	Steven Z. Berger CEO	Craft & Hobby Association 319 E 54 <sup>th</sup> Street Elmwood Park, NJ 07407
39	3/24/09	Ed Rogers President	FoodSource Lure Corporation 3733 4 <sup>th</sup> Terrace N Birmingham, AL
40	3/24/09	Sean Bersell Vice President Public Affairs	Entertainment Merchants Association 16530 Ventura Boulevard Suite 400 Encino, CA 91436

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
41	3/24/09	Carol H. Fuller	4 Baird Court Carlisle, PA 17013
42	3/25/09	Janet Nudelman Director of Program & Policy	Breast Cancer Fund
		Rachel Weintraub Director of Product Safety and Senior Counsel	Consumer Federation of America
		Donald Mays Senior Director, Product Safety and Technical Public Policy	Consumers Union
		Nancy A. Cowles Executive Director	Kids in Danger
		Diana Zuckerman President	National Research Center for Women & Families
		David Arkush Director, Congress Watch	Public Citizen
		Elizabeth Hitchcock Public Health Advocate	U.S. Public Interest Research Group (U.S. PIRG)
43		Ruth Kubierschky	<a href="mailto:ruthkubi@earthlink.net">ruthkubi@earthlink.net</a>
44		Dr. C.T. Helmes Executive Director	Personal Absorbents Products Council 1850 M Street, NW #700 Washington, DC 20036
45		Tim Zacharewski	Michigan State University Department of Biochemistry 501 Biochemistry Building Wilson Road East Lansing, MI 48824-1319

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
46	3/25/09	David O'Connell Sr. VP Global Sourcing and Procurement	Wilton Products, Inc. 2240 West 75 <sup>th</sup> Street Woodbridge, IL 60517
		Submitted by: Anne-Louise Vreeman Director, Quality Assurance & Global Compliance	Wilton Products, Inc.
47	3/25/09	Carter Keithley President	Toy Industry Association 1025 F St., NW, 10 <sup>th</sup> FL Washington, DC 20004
		Submitted by: Ed Desmond Executive VP, External Affairs	Toy Industry Association
48	3/25/09	Larry Meddock WSIA Executive Director	Water Sports Industry PO Box 56812 Orlando, FL 32815-8512
49	3/25/09	Caroline Riepler	Little Journeys Baby World
50	3/25/09	Michael F. Altschul Sr. VP and General Counsel	CTIA-Wireless Association 1400 16 <sup>th</sup> St., NW, Ste 600 Washington, DC 20036
		Submitted by: Kerrie C. Campbell Manatt, Phelps & Phillips, LLP	
51	3/25/09	Christopher Bryant Phthalate Esters Panel	American Chemistry Council 1300 Wilson Council Arlington, VA 22209
		Submitted by: Heather Palfrey Coordinator, Chemical Products and Technology Division	American Chemistry Council

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
52	3/25/09	Submitted by: Cathi Huber on behalf of Georgia, Ravitz	Arent Fox LLP 1050 Connecticut Ave., NW Washington, DC 20036-5339
		Filed on behalf of Aquatic Sports Suppliers Association	
53	3/25/09	Jessica E. Franken Director of Government Affairs	INDA-Association of the Nonwoven Fabrics Industry 3366 2 <sup>nd</sup> Street South Arlington, VA 22204
54	3/25/09	Heidi K. McAuliffe Counsel, Government Affairs	National Paint & Coatings Association, Inc. 1500 Rhode Island Ave., NW Washington, DC 20005
55	3/25/09	Robert Waller, Jr., President	Juvenile Products Manufacturers Assoc. Inc. 15000 Commerce Parkway Suite C Mt. Laurel, NJ 08054
56	3/25/09	Fred Mills-Winkler	EMC Consumer Product Services, Inc.
57	3/25/09	Stephanie Lester Vice President International Trade	Retail Industry Leaders Association 1700 N. Moore Street Suite 2250 Arlington, VA 22209
58	3/25/09	M. Todd Mitchem Corporate Counsel	Simmons Bedding Company One Concourse Parkway Atlanta, GA 30328-5369
59	3/25/09	Mark R. Kaster	Dorsey & Whitney LLP 50 South Sixth Street Suite 1500 Minneapolis, MN 55402

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
60	3/25/09	Peter J. Shakula	Wood/Phillip 500 W. Madison Suite 3800 Chicago, IL 60661
61	3/25/09	Sarah Janssen	Natural Resources Defense Council 111 Sutter St., 20 <sup>th</sup> Floor San Francisco, CA 94104
62	3/25/09	Nicola O'Reilly	<a href="mailto:ncoreilly@comcast.net">ncoreilly@comcast.net</a>
63	3/25/09	Worth Jennings Global Oxo Marketing Manager	ExxonMobil Chemical
64	3/25/09	Stanley Geller HIA Chairman	Halloween Industry Association 15000 Commerce Parkway Suite C Mt. Laurel, NJ 08054
65	3/25/09	Sarah Schimeck	Ada, MI
66	3/25/09	Brian Markwalter VP, Technology & Standards	Consumer Electronics Association
		Christopher Cleet Director of Environmental	Information Technology Industry Council
		Ronald F. Chamrin Manager of Government Relations	IPC-Association Connecting Electronics Industries®
67	3/25/09	Arnikka L. Robinson	<a href="mailto:ittybittyrevolution@yahoo.com">ittybittyrevolution@yahoo.com</a>
68	3/26/09	Michelle Mathews	<a href="mailto:michellemathews8@gmail.com">michellemathews8@gmail.com</a>
69	3/26/09	Lynn Pagel	Sheboygan, WI
70	3/26/09	Gordon Meyer Business Development Analyst-Polymers	Applied Technical Services 1049 Triad Court Marietta, GA 30062

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
71	3/25/09	Elizabeth Hausler Sr. Director of Technical Services	Bureau Veritas
72	3/25/09	Christopher Hudgins VP, Government Relations & Policy	International Sleep Products Association 501 Wythe Street Alexandria, VA 22314
73	3/25/09	Robert T. Stack Esquire	Tompkins & Davidson, LLP Five Hanover Square 15 <sup>th</sup> Floor New York, NY 10004
74	3/25/09	Jerry Kritzman	GCI <a href="mailto:jerry@sendmaui.com">jerry@sendmaui.com</a>
75	3/25/09	Marcia Y. Kinter VP, Government and Business Information	Specialty Graphic Imaging Association (SGIA)
76	3/25/09	Maria Klesney	Mom N Mia Quilts
77	3/25/09	Michele Marini Pittenger President	Travel Goods Association 5 Vaughn Drive, Suite 105 Princeton, NJ 08540
78	3/25/09	Kenneth Ross Counsel for Rainbow Play Systems, Inc.	Bowman and Brooke LLP Minnetonka, MN 55345
79	3/25/09	Bill Sells VP of Government Relations  Submitted by: Lauren Wallace Marketing Manager	Sporting Goods Manufacturers Association 1150 17 <sup>th</sup> St., NW Ste. 850 Washington, DC 20036
80	3/25/09	Steve Pfister Senior Vice President Government Relations	National Retail Federation Liberty Place 325 7 <sup>th</sup> St., NW, Ste. 1100 Washington, DC 20004

<u>COMMENT</u>	<u>DATE</u>	<u>SIGNED BY</u>	<u>AFFILIATION</u>
81	3/25/09	Timothy E. Sullivan Deputy Attorney General for  Edmund G. Brown Jr. Attorney General  Submitted by: Harrison Pollak	State of California Department of Justice 1515 Clay Street, 20 <sup>th</sup> FL Oakland, CA 94612-0550
82	3/25/09	Gary Jones Director, Environmental, Health, and Safety Affairs	Printing Industries of America 200 Deer Run Road Sewickley, PA 15143-2600
83	3/26/09	Laura E. Jones Executive Director  Submitted by: John B. Pellegrini McGuireWoods LLP	United States Association of Importers of Textiles and Apparel 13 East 16 <sup>th</sup> Street, 6 <sup>th</sup> FL New York, NY 10003
84	3/27/09	Deborah M. Fanning Executive Vice President	The Art and Creative Materials Institute, Inc. 1280 Main Street, 2 <sup>nd</sup> FL Hanson, MA 02341
85	3/17/09	Michael Dowell President	Moodoo Products, Inc. 579 W. Loma Alta Drive Altadena, CA 91001
86	4/01/09	Maurice Loo Deputy Director-General	Hong Kong Economic & Trade Office 1520 18 <sup>th</sup> Street, NW Washington, DC 20036
87	4/07/09	Kevin Burke President and CEO	American Apparel & Footwear Association 1601 North Kent Street Suite 1200 Arlington, VA 22209

212-973-7732  
tgonzalez@gdlsk.com

December 5, 2008

**VIA FEDEX**

Office of the Secretary  
Consumer Product Safety Commission  
4330 East-West Highway, Room 502  
Bethesda, MD 20814.

Re: **Section 108: Phthalates in Children's Toys (Comment)**  
Our Reference: 10609-0110001

Dear Sir or Madam:

This letter is submitted on behalf of our client, Speedo USA, a division of Warnaco Group, Inc., regarding Section 108 of the Consumer Product Safety Improvement Act ("CPSIA") concerning the prohibition on sale of children's toys containing specified phthalates. Subsection 108(a) prohibits the manufacture, import, distribution, or sale of "children's toys" or "child care articles" containing more than 0.1% of benzyl butyl phthalate (BBP), dibutyl phthalate (DBP), or di-(2-ethylhexyl) phthalate (DEHP) beginning February 10, 2009. Subsection 108(b)(1) prohibits, on an interim basis, the manufacture, import, distribution, or sale of "children's toys that can be placed in a child's mouth" or child care articles containing more than 0.1% of diisodecyl phthalate (DIDP), diisononyl phthalate (DINP)<sup>1</sup>, or di-*n*-octyl phthalate (DnOP), beginning February 10, 2009.<sup>2</sup>

---

<sup>1</sup> DINP, which is used to soften some plastic toys and children's products, was the subject of a comprehensive study by the Consumer Product Safety Commission in 1998. That study concluded that few, if any, children were at risk from the chemical because the amount they ingest does not reach a level that would be harmful and stated that "the Commission staff is not recommending a ban on these products."

<sup>2</sup> Subsection 108(b)(2) also requires the Commission to begin the process of appointing a Chronic Hazard Advisory Panel (CHAP) "not before" February 10, 2009. The purpose of the CHAP is to review the potential effects on children's health of all phthalates and phthalate alternatives in children's toys and child care articles. The CHAP

The Consumer Product Safety Commission (the “Commission”) has defined a children’s toy as “a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.” Speedo USA produces a variety of swim goggles for adults and children. The goggles are sized as either “Adult” “Junior,” or “Kid’s.” The Junior and Kid’s goggles are designed to fit smaller, narrower faces. Speedo also makes “creature” goggles for children that feature sharks, reptiles, or similar whimsical overlays on the goggles. Representative pictures of Speedo USA’s goggles are attached hereto.

For the following reasons, we strongly urge the Commission to clarify the definition of children’s toys to specifically exclude swim goggles.

## **I. SWIM GOGGLES ARE NOT TOYS**

### **A. Swim Goggles are Sports Equipment**

Even where a particular model of goggles is specifically designed for children (i.e., the “creature” goggles), the activity they are used for – swimming – is considered a sporting activity.<sup>3</sup> As a sport, swimming involves the use of specialized equipment, such as swimsuits, swimcaps, earplugs, and goggles. Even in instances where swimming might be considered play, goggles are not required to engage in that activity. In this sense, goggles are akin to swimsuits: both items are designed for use while engaged in recreational activity, but neither item is intended to be played with, even if intended for use by a child.

Speedo USA’s goggles are specifically designed for sport. Three sporting grades are available, depending on the user’s activity level: The “Active” goggles are designed for use by recreational swimmers;<sup>4</sup> the “Performance” goggles, which are used for long training workouts, are intended for daily swimming exercise; and Speedo’s “Competition” goggles are designed for the competitive swimmer. All of the goggles offer UV protection, an anti-fog feature, and a “speedfit” headstrap for reducing drag in the water. Some of the goggle models feature

---

will recommend to the Commission whether to continue the interim ban and whether additional bans on phthalates or phthalate alternatives are needed.

<sup>3</sup> Many schools require swimming as part of the physical education curriculum, for example, and many schools and colleges have competitive swim teams. Similarly, many health and fitness clubs feature swimming pools and offer swimming classes as a form of exercise.

“aquasocket” technology, also designed to reduce drag. These features are available in all size ranges.

**B. U.S. Customs and Border Protection Does Not Consider Swim Goggles Toys**

U.S. Customs and Border Protection’s (“Customs”) classification of children’s swim goggles provides further support for excluding them from CPSIA’s definition of children’s toys. Customs does not classify swim goggles for children as either toys *or* water sports equipment. *See* NY H86652 (Jan. 16, 2002) (“The swim goggles are not water sport equipment but rather are used for the protection of the eyes while swimming, usually in a pool . . . .”); *see also* NY G84446 (Dec. 5, 2000) (swim goggles contained in a youth combo snorkel pack are not toys or sporting goods). Rather, Customs consistently classifies swim goggles under HTSUS 9004.90.0000, which covers “spectacles, goggles, and the like, corrective, protective, or other.”

Customs classifies swim goggles under heading 9004 regardless of whether the goggles are designed for children or adults. *See, e.g.*, NY F84727 (Mar. 31, 2000) (swim goggles classified as spectacles, goggles, and the like; not specified whether adult or children’s); PD D83022 (Oct. 7, 1998) (same); NY C87534 (May 28, 1998) (“Swim Goggles (Junior)” classified as spectacles, goggles, and the like, protective or other . . .); NY 829617 (June 7, 1988) (“junior” swim goggles classified under HTSUS 9004.90.0000, as spectacles, goggles, and the like).

Even where the goggles are clearly sized or designed specifically for children, they are still not classified as toys. Customs ruling NY K80849 (Dec. 22, 2003) concerned swim masks in four styles – Spiderman, Teenage Mutant Ninja Turtle, Shark Man, and Ariel the Little Mermaid – whose intended use was for swimming. Customs classified the swim masks under 9004.90.0000, “spectacles, goggles, and the like,” not as toys or sporting goods. Likewise, in NY J89436 (Oct. 3, 2003), the swim goggles at issue were part of a “Diving Game Combo” that included weighted “diving gators” and “diving sticks” that, when thrown into water, sink to the bottom for retrieval by a swimmer. The accompanying goggles were designed nearly identically to Speedo’s swim goggles, with rubber eye gaskets and an elastic strap for securing to the head. The goggles were classified under 9004.90.0000, not as toys.

---

<sup>4</sup> The “creature” goggles have whimsical character overlays with eyesocket and headstrap technology that is similar to the “Active” style adult goggles.

**II. SPEEDO'S SWIM GOGGLES OFFER THE SAME FEATURES REGARDLESS OF SIZE**

While there are design difference amongst the different models, Speedo USA's goggles offer the same features and protection regardless of size. The Adults, Junior, Kid's and "creature" goggles feature UV protection, anti-fog, and are latex-free. Moreover, all the Adult, Junior and Kid's versions within a particular model line possess the same fit, frame construction, eyesocket structure and adjustable silicon headstrap. Even the "creature" goggles have the same features as some of the adult goggles.

Aside from size, there are no design differences among the goggles despite their designations as Adult, Junior, or Kid's. The packaging of the various models is identical and they are not marketed to a particular age group. Thus, a small adult woman might choose the "Junior" or "Kid's" size, while a larger child may find that an Adult size fits him best.

**III. CONCLUSION**

Speedo USA's swim goggles offer the same features regardless of whether they are designed to fit adults or children. Even where a particular model's design indicates that it is intended for children, the goggles are not playthings. Swim goggles are sporting equipment, not toys. We therefore request that the Commission confirm that Speedo USA's goggles are not considered "toys" under the CPSIA and therefore not subject to the ban on phthalates.

Sincerely,

GRUNFELD, DESIDERIO, LEBOWITZ,  
SILVERMAN & KLESTADT LLP

Alan R. Klestadt

Tracey Topper Gonzalez

Attachments

399029\_1

## Stevenson, Todd

---

**From:** Gonzalez, Tracey T. [TGonzalez@GDLSK.COM]  
**Sent:** Monday, January 05, 2009 5:47 PM  
**To:** Phthalates Project  
**Subject:** Status of Comments  
**Attachments:** Comment - Children\_s Goggles.pdf

**Categories:** Question

Dear Sir or Ma'am:

My firm submitted comments to CPSC on behalf of our client, Speedo USA, on December 5, urging the Commission to clarify the definition of children's toys to specifically exclude swim goggles. A copy of that letter is attached for your reference. Can you please let me know the status of that request?

Many thanks,  
Tracey

---

Tracey Topper Gonzalez, Esq.  
Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP  
399 Park Avenue - 25th Floor  
New York, NY 10022  
Telephone: (212) 973-7732  
Facsimile: (212) 557-4415  
e-mail: [tgonzalez@gdlsk.com](mailto:tgonzalez@gdlsk.com)  
website: [www.gdlsk.com](http://www.gdlsk.com)

---

NOTICE: This e-mail, and any attachments thereto, are intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, distribution or copying of this e-mail, and any attachments thereto, is strictly prohibited. If you have received this e-mail in error, please immediately notify me by telephone and permanently delete the original and destroy any printout thereof.

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury Department regulations, we inform you that any U.S. federal tax advice contained in this correspondence (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.



Section 108

2

February 10, 2009

The Honorable Nancy A. Nord  
Acting Chairman  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

The Honorable Thomas Moore  
Commissioner  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

RE: Additional Guidance on Phthalates Required

Dear Acting Chairman Nord and Commissioner Moore:

On behalf of the National Retail Federation (NRF), I am writing to request that the Consumer Product Safety Commission (CPSC) immediately issue further guidance and an enforcement policy with regards to phthalates, Section 108 of the Consumer Product Safety Improvement Act (CPSIA). In light of the decision of United States District Court for the Southern District of New York that Section 108 must now apply retroactively to include current inventory, the industry needs to immediate guidance on how to comply with the requirement.

It is important to stress that NRF's members are doing everything they can at this point to ensure compliance with all the provisions of the CPSIA. NRF's members along with the rest of the affected industries have been relying on the guidance and opinions of the CPSC in determining how to comply with the CPSIA. As such, companies were not evaluating existing inventory for issues related to phthalates. In addition, the CPSC hasn't issued any guidance to date on the issue, including testing requirements, besides seeking comments from industry. The decision by the court has now overturned the CPSC's General Counsel's opinion that Section 108 would be applied prospectively.

As a result of the court decision, retailers are now pulling products from their shelves and their inventories to test for phthalates. Testing for phthalates is more difficult and expensive than testing for lead. The expense doesn't just relate to the test itself, which can run several thousand dollars per product, but the logistics of pulling the products from the store shelves and distribution centers. Retailers and manufacturers are already having issues finding available labs to test for lead. There are even less labs available for phthalates testing and none have been approved by the CPSC as a third party testing facility. The CPSC just yesterday issued test methods for determining whether or not phthalates exist in a product. This was done hours before the February 10<sup>th</sup> deadline for the new ban on products containing phthalates.

Liberty Place  
325 7th Street NW, Suite 1100  
Washington, DC 20004  
800.NRF.HOW2 (800.673.4692)  
202.783.7971 fax 202.737.2849  
www.nrf.com

While the CPSC issued a stay of enforcement on January 30<sup>th</sup> for certain testing and certification requirements, including phthalates, this did not stay the underlying requirement of the CPSIA that products must meet the new lead and phthalate requirements in order to be sold. Because of this underlying requirement, retailers are still requiring that their vendors and suppliers ensure that their products meet these standards.

It is critical that the CPSC issue additional guidance immediately to help both retailers and manufacturers comply with the new regulations. Most importantly, industry needs to know how to determine what products are covered by Section 108 as well as those products which are not covered. Industry cannot wait months for this guidance. Without this critical guidance there will be continued chaos in the marketplace as retailers attempt to determine what is required of them to comply with the underlying requirements of the CPSIA.

By way of background, the NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees - about one in five American workers - and 2007 sales of \$4.5 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

We understand the extreme burden that has been place on the agency as a result of the CPSIA and we thank the agency for the work that it has done to date with its limited resources. We believe the issue of phthalates should become a top priority for the agency as a result of the court decision.

I would like to thank you for considering our request. If you have any questions, please contact Jonathan Gold ([goldj@nrf.com](mailto:goldj@nrf.com)), NRF's Vice President, Supply Chain and Customs Policy in the NRF office.

Sincerely, Sincerely,



Steve Pfister  
Senior Vice President  
Government Relations

---

**From:** Sarah Natividad [sarah.natividad@gmail.com]  
**Sent:** Friday, February 13, 2009 1:48 AM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information

I.A. a. I find the guidance regarding primary and secondary feeding and care products a bit unclear. For example, where do nursing pillows fall? A nursing shield (and presumably a nursing bra too?) is a secondary item, but a baby lays directly on a nursing pillow. It's a step in the right direction, but there's still too much gray area between a primary and secondary care product.

I. C. I think it would be helpful to make a definition that looks something like this (not necessarily exactly like this):

"A product used for feeding and care of a baby is defined as a "primary feeding and care product" if it is designed to be placed in the baby's mouth, or it meets any 2 of these 3 criteria and is not dual-regulated by FDA and CPSC:

- \* touches the baby directly while the baby is feeding or being cared for
- \* may incidentally be placed in the baby's mouth
- \* some other third criterion that minds immeasurably superior to mine can come up with late at night

Another thing I think would be useful is to pre-emptively exclude certain materials from phthalate testing, such as textiles, wood, and other non-plastic, non-vinyl materials. With phthalate testing having to be done in a third party lab and at great expense, it would be wasteful of what little lab capacity we have to tie them up testing endless bib fabric samples when they could be testing plastics.

I.D. If you come up with a fuzzy definition, you're just going to spread more confusion in the marketplace. Make your definitions as bright-line clear as possible. If you don't know how to do it, I recommend consulting a mathematician. Mathematicians are used to working with clear definitions.

II. A. Yes.

II. B. If the characters are marketed exclusively to children 12 and younger or are of interest exclusively to that age group (e.g. Dora the Explorer, Bob the Builder) I would say it should be considered a toy. If the characters are not exclusively marketed to children 12 and younger (e.g. Hello Kitty, Tinkerbell) it should not. I would imagine the owners of cartoon characters typically will have data on the demographics of their target market, if it's not obvious whether the items are marketed exclusively to under-13s. I recommend you should define what "exclusively" means. I would say if 90% of their target market is under 13, it's a children's item. If 90% isn't the right percentage, pick a different one-- 70%, or 50%, or whatever. But I'd recommend picking a percentage. There's always going to be a few strange adult collectors of Dora or Bob the Builder stuff and we shouldn't let them skew it too much, but on the other hand we don't want every Disney cellphone being considered exclusively for children.

II. D. Tricycles are typically made of the same types of materials as bicycles. Specifically, they have metal frames. Big Wheels have plastic frames. I would propose that if they have metal frames they be considered tricycles and are not covered by Section 108, and if they have plastic frames then they are toys and are covered by Section 108. However, this leaves open the possibility that somebody makes a 4-wheeled metal framed ride. I would consider that not a toy, but I didn't see quadricycles listed under ASTM F963 either.

II. G. Yes.

II. H. A crib should not be considered a child care item. It is a piece of furniture and is sold as such along with matching dressers. Also many cribs are designed to be reconfigured into toddler beds or even into twin size beds that can be used by a child well past the age of 3. This makes the temporary state of being a crib not their

primary purpose, as they will likely be used as a bed for many more years than they are used as a crib.

II. J. a. Bib- child care article.

b. Pajamas- not a child care article or toy, but apparel. The distinction between pajamas and daywear for babies is too muddied to draw a bright line. Example: All my babies, for their first months of life, both slept and woke in gowns and sleepers. You can't dress 'em in nighties until they start going night-night at night.

c. Mattress- child care article

d. Mattress cover- child care article

e. Crib sheets- child care article

f. Infant sleep positioner- child care article

g. Play sand- I don't know what you mean by play sand. If you mean sand in which a child plays in a sandbox, this is neither a toy nor a child care article; it is a naturally occurring mineral substance. It's dirt, for crying out loud, and you buy it at Home Depot, not Baby Depot. Doesn't that put it under EPA jurisdiction?

i. Baby swing- not a toy or child care article. However many swings have attached or built-in toys that are, in my opinion, toys. But the entire swing is not a toy.

j. Decorated swimming goggles- toy.

k. Water wings- toy.

l. Shampoo bottle- not a child care article or toy. I don't know about your kids, but my kids are not allowed to suck on or play with the shampoo bottle, no matter how brightly colored or appealingly shaped it may be.

m. Costumes and masks- I would consider these apparel but you might consider them toys.

n. Baby walkers- same as baby swings.

o. Wading pools- not a child care article or toy. If your kid is licking the wading pool, he's probably also drowning, or will be soon unless you get your butt over there and pull his mouth off it. Save yourselves some work; classify wading pools as non-toys.

II. K. Only those advertised as aids for sleeping, feeding, sucking, or teething should be classified as child care articles under Section 108. Toys attached to bouncers, swings, and strollers should be classified as toys, but not the rest of the item e.g. the seat, the frame, the mechanism, etc.

II. L. If the promotional item has appeal to a wide variety of ages, I would not classify it as a toy. For example while a child might play with a frisbee, a teenager or adult might also play with a frisbee. If it were, say, a promotional plastic dump truck, it could be classified as a toy because typically a teenager or adult would not play with a dump truck (outside of playing with a child under 13). In considering the appeal of the item to children, you should also consider that which is being advertised on the item. A promotional squishy ball advertising an adult film store is NOT a child's toy.

II. M. Yes, please exclude durable playground equipment that is permanently affixed to the ground e.g. with concrete. Do you realize how unendingly silly it would be to test playground equipment for phthalates? What infant could put a playground into his mouth and suck it for any length of time?

II. N. that sounds like a decent definition, although I still think if your child is sucking on a wading pool he's drowning.

II. O. I skimmed the test method but I don't know enough about chemistry to really have an informed opinion, however I get the gist of it and that sounds good.

--

Sarah Natividad

<http://www.curious-workmanship.com>

<http://organicbabyfarm.blogspot.com>

**Stevenson, Todd**

---

4

**From:** Judy E. Reid [reidsranch@3riversdbs.net]  
**Sent:** Friday, February 13, 2009 7:32 AM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information."

Good Morning from Montana!

Could you please tell me about Plastic eyes with metal safety locks that are used in making stuffed animals -- are these thought to contain phthalates?

Thank you in advance for your answer to my question.

Judy Elizabeth Reid  
Box 6, Babb, MT 59411  
[reidsranch@3riversdbs.net](mailto:reidsranch@3riversdbs.net)  
(406) 732-5549

**Stevenson, Todd**

---

**From:** Paul Crosby [paul.crosby@chichesterinc.com]  
**Sent:** Friday, February 13, 2009 2:25 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; request for comments and information

February 13, 2009

**Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information."**

I. General Approach

A.

b. I think it is important to be as clear as possible about which specific items you are concerned about in the first place. My understanding of which items you are concerned about reminds me of a professor in university telling us about a general he knew in Guatemala during the 1970s who commented that they had to kill all communists, everyone who supported the communists, and everyone who could become a communist. That does not leave many people left. Your focus on anything that is a toy or could become a toy or might be a toy is too general. I have more than 5,000 items in my database and sell many items that could be a toy or could appear to be a toy for someone 12 years old or younger. How am I to know what to test and what not to test. Where are the real problems with lead and phthalates? It seems like you are covering so many possibilities that virtually everything is subject to your new law.

B. Make a long list of specific items that you are concerned about—not generalities.

C. Be specific.

D. You are going to put a lot of small manufacturers, importers, and distributors out of business. If your concern is rubber duckies finished with lead paint made in China, focus on these. The way the law is written as far as I can see is that it requires the innocent to prove their innocence and track the daylights out of it. This seems incredibly inefficient and damaging to firms, consumers, and the economy.

II.

A. Add to this list of exclusions or just focus on the list of inclusions instead.

D. Isn't "Big Wheels" a registered trademark? Shouldn't you show this? Frankly, if an item is being used by a child why is it being excluded?

E. Sure, I import toy wood swords, daggers, and shields from England. Exclude these please. Are Davy Crockett hats and "Skunk Hats" made from rabbit skins toys? Exclude these, too. In fact, exclude just about everything that is not a known problem. It will cost me about US\$2,000 per item for all the tests to show that these are lead and phthalate free. How many fur hats contain lead?

G. Your focus on kids age 12 and under is a broad range. At what point do kids stop putting stuff in their mouths?

O. I don't even know how to pronounce phthalates so I cannot comment on the tests except that they look complicated and expensive.

If you have any comment or questions, you may reach me at 1.800.206.6544 or [paul.crosby@chichesterinc.com](mailto:paul.crosby@chichesterinc.com)

---

Paul Crosby  
President  
Chichester, Inc.  
2045 Niagara Falls Blvd, Unit 9  
Niagara Falls, New York  
14304 USA

P: +1.716.298.1183  
F: +1.716.298.0313  
E: [paul.crosby@chichesterinc.com](mailto:paul.crosby@chichesterinc.com)  
W: [www.chichesterinc.com](http://www.chichesterinc.com)

Paul Crosby  
President  
The Chichester Group  
3044 Bloor Street West, Suite 305  
Toronto, Ontario  
M8X 2Y8 Canada

P: +1.416.232.0376  
F: +1.416.232.2297  
E: [paul.crosby@chichesterinc.com](mailto:paul.crosby@chichesterinc.com)  
W: [www.chichestercanada.com](http://www.chichestercanada.com)

Stevenson, Todd

---

6

**From:** Larry Buchtman [LBuchtman@AcmeUnited.com]  
**Sent:** Friday, February 13, 2009 12:31 PM  
**To:** Section 108 Definitions  
**Subject:** Public Comment: Draft Guidance on Phthalates

A response to CPSC press release dated February 12, 2009,  
"CPSC Developing Practical Guidance For Meeting Phthalates Requirements In New Child Safety Law; Public Input Sought"

I have read the draft guidance for section 108 of the CPSIA.  
<http://www.cpsc.gov/about/cpsia/draftphthalatesguidance.pdf>

School products, specifically math and measuring supplies, should be exempt from the standard in my opinion.

- \* They are not considered "toys" but fall under the broader classification of childrens products, included in the standard.
- \* They are never intended to be placed in the mouth and this only takes place with very limited frequency and contact when it does.

Thank you for the opportunity to provide input.

Larry Buchtman  
VP - Technology  
Acme United Corporation  
701 S. Wilson Street  
Fremont, NC 27830

Phone (919) 242 5182 x221  
[l.buchtman@acmeunited.com](mailto:l.buchtman@acmeunited.com)

**Stevenson, Todd**

---

7

**From:** Peter J. Baldes [p.baldes@wagarassoc.com]  
**Sent:** Monday, February 16, 2009 1:43 PM  
**To:** Section 108 Definitions  
**Subject:** EXCLUSIONS

SIRS:

We have had several inquiries about our products and how they fit into the section 108 definitions.

We are wholesale distributors of packaging products used for music, video and software. Our products are various kinds of plastic cases known in the industry as "jewel cases" or "CD boxes" These are injection molded of primarily clear polystyrene. They may be used by our customers to package children's music, games or videos. Although very small children would not be likely to handle these, children in the 10 to 12 year old range would be very likely to have music or games that they would touch.

In addition, we have DVD and Game boxes made of polypropylene, known in the industry as DVD "Amaray" or Game boxes for X-box, Play Station and Nintendo. These boxes also have a clear vinyl outer sleeve which is designed to hold label graphics.

It is unlikely that any of our products would be chewed, sucked on or swallowed. They are not painted in any way and would, under most circumstances, with small children, be handled by an adult to insert into a "playing" device. They are not toys as such. The intellectual content contained on or in them can be to teach or entertain but is not a toy in itself.

Should these boxes or cases be excluded from the testing requirements?

Thank-you

Peter Baldes  
Vice President  
Wagar Associates, Inc  
51 Industrial Park Road  
Sterling, CT 06374  
860 564-1124  
[www.wagarassoc.com](http://www.wagarassoc.com)

---

**From:** CONNIE HAYES [lchayes3@verizon.net]  
**Sent:** Monday, February 16, 2009 12:04 PM  
**To:** Section 108 Definitions  
**Subject:** CPSIA -toys/books

This is by far the most ludicrous legislation I have ever read. There are a thousand plus more items that toddlers/children put into their mouths. If Phthalates are the issue, why not ban the use of phthlates from being used in the manufacturing of ANYTHING.

How many **documented** cases of child injury are there from sucking on items that contain phthlates?

Can it be proven that phthlates were indeed the culprit or were there variables involved?

Removing Children's books published from 1985 and earlier is an atrocity !! It smacks of Nazism. First of all, children do not have a habit of eating or sucking on books, wading pools, Big Wheels, etc. And how many hours of having these articles in ones mouth would it take to produce adverse effects? If the answer to this is known, where can I veiw this information?

I would like to know what benefits are to be had by the people backing such an extreme bill ??

Connie Hayes

**Stevenson, Todd**

---

9

**From:** dodie winstead [dodiewinstead@comcast.net]  
**Sent:** Monday, February 16, 2009 12:00 PM  
**To:** Section 108 Definitions  
**Subject:** toy ban

I have a question about plastic toys like Polly Pockets. They aren't designed for children under the age of 3, but are certainly designed for kids under the age of 12. Many of the parts are under the 5cm size noted.

I help run a consignment thrift shop. These toys, and others like them, come in all the time. They rarely include the packaging, so checking to see if ASTM F963 is usually futile; as nearly all the toys I've gone through since this law was brought to my attention are unmarked.

Must we refuse these consignments, or throw away the donations? This seems utterly absurd. Surely, this is not the intent of this legislation. Am I misunderstanding the law?

Thank you,

Dodie Winstead  
[Dodiewinstead@comcast.net](mailto:dodiewinstead@comcast.net)

10

**Stevenson, Todd**

---

**From:** AESEZ@aol.com  
**Sent:** Monday, February 16, 2009 11:57 AM  
**To:** Section 108 Definitions  
**Subject:** Overreaching

This is a bad law, and it will kill small businesses! Why not just start now, and grandfather everything else in?  
Esther Ziol  
[aesez@aol.com](mailto:aesez@aol.com)

---

**A Good Credit Score is 700 or Above. See yours in just 2 easy steps!**

**Stevenson, Todd**

---

//

**From:** Michael Zhang [michael.zhang@qaichina.net]  
**Sent:** Monday, February 16, 2009 10:01 AM  
**To:** Section 108 Definitions  
**Cc:** bob.luo  
**Subject:** CPSC-CH-C1001-09 question  
**Attachments:** P1260987.JPG; P1260986.JPG

Dear Sir or Madam:

This is Michael from QAICHINA, we are one of CPSC certified testing lab for Lead content in surface coating in China. Now, we are going to follow up CPSC SOP for Phthalate compliance testing.

I read CPSC-CH-C1001-09 Standard Operating Procedure for Determination of Phthalates, on Section "Sample Preparation", I found that the CPSC phthalate test would be done for the sample(i.e., a homogeneous mixture of component parts), which is different to EU Directive 2005/84/EC by mass of the plasticised material, in toys and childcare articles. And as in the note, Certain parts, such as unpainted metal, glass or ceramic parts would be considered as phthalate-free and would need only to be weighed for inclusion in the overall toy weight. Does that mean, if a toy content plastic(m1) and unpainted metal(m2), the US Overall concentration would be less than EU concentration?

The second question is according to CPSC-CH-C1001-09, Section "Sample Preparation", please kindly check the attachment "P1260986.JPG", the plastic toy has same material and figuration, just different in color. So for CPSC phthalate compliance, we should not test each color, just for the composition of different colors, and measure the overall concentration? In attachment "P1260987.JPG", as different kind of plastic were used in toys, should we test them together as one sample? Or separate to different materials?

Your prompt comment would be highly appreciated!

Thanks with best regards

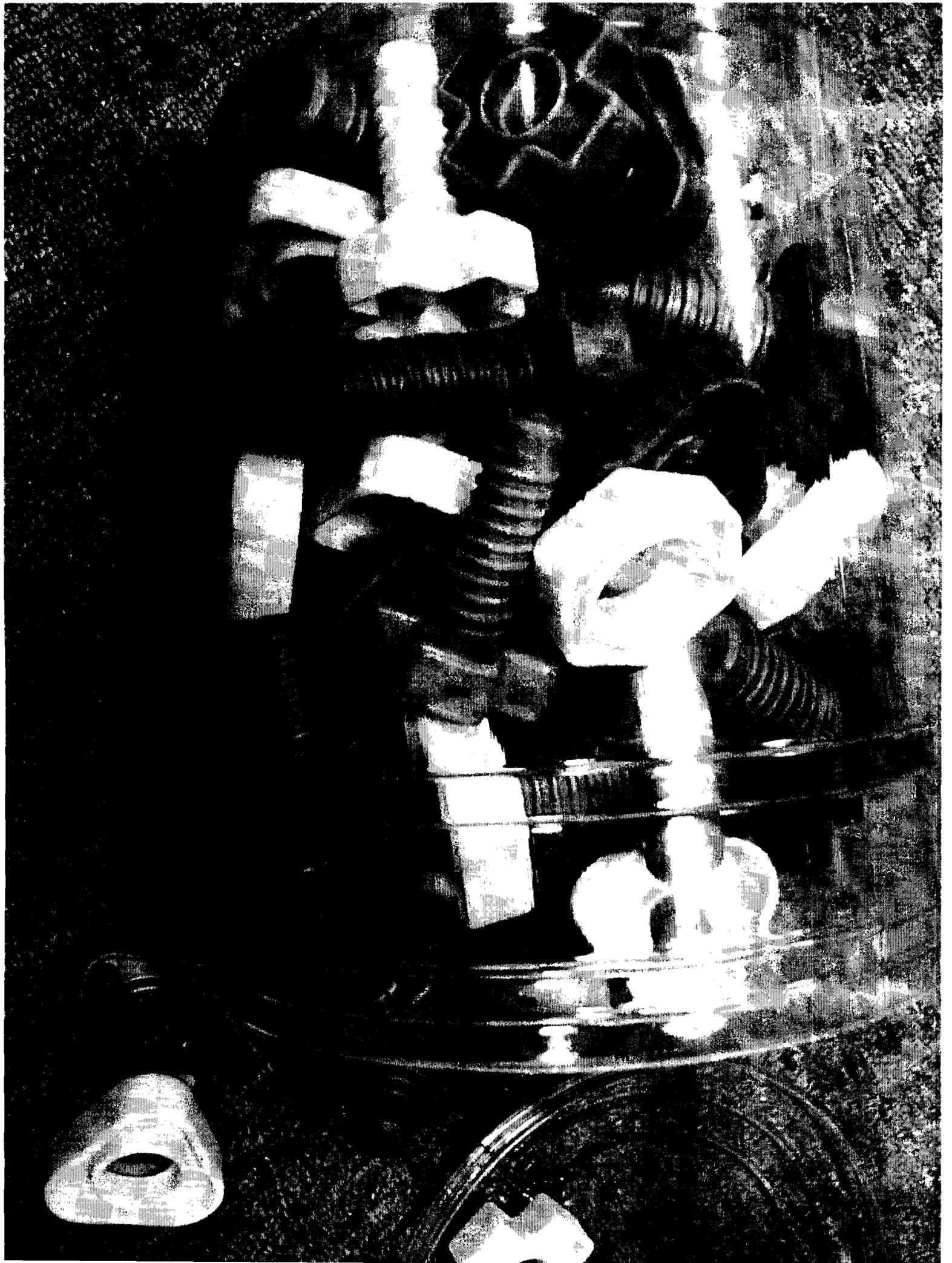
本邮件附件清单如下：

- (1) P1260987.JPG (494.0 K)
- (2) P1260986.JPG (471.8 K)

**Michael Zhang**

Project Manager  
QAICHINA Quality Services Co., Ltd.  
Tel: (86) 571 8890 7033  
Fax: (86) 571 8890 5288





**Stevenson, Todd**

12

**From:** CRESOR@cs.com  
**Sent:** Friday, February 13, 2009 7:26 PM  
**To:** Section 108 Definitions  
**Subject:** Is the MathShark made by Educational Insights a "toy" under Section 108

To whomever it may concern:

Are hand-holdable electronic learning aids intended for use by children "toys" for purposes of Section 108.

Two examples of such electronic learning aids are:

MathShark described at

[https://educationalinsights.com/Merchant2/merchant.mv?Screen=PROD&Store\\_Code=EISchoolProducts&Product\\_Code=8493&Category\\_Code=120](https://educationalinsights.com/Merchant2/merchant.mv?Screen=PROD&Store_Code=EISchoolProducts&Product_Code=8493&Category_Code=120)

and

Math Whiz described at

[https://educationalinsights.com/Merchant2/merchant.mv?Screen=PROD&Store\\_Code=EISchoolProducts&Product\\_Code=8899&Category\\_Code=120](https://educationalinsights.com/Merchant2/merchant.mv?Screen=PROD&Store_Code=EISchoolProducts&Product_Code=8899&Category_Code=120) ) manufactured by Educational Insights

C. Resor  
P. O. Box 667  
Wilson, WY 83014

**Stevenson, Todd**

---

**From:** Kenneth Bogen [kbogen@exponent.com]  
**Sent:** Friday, February 13, 2009 2:50 PM  
**To:** Section 108 Definitions  
**Subject:** Re: CPSIA Section 108: phthalates in wipes, lotions & creams advertised as baby/child sleep aids

Dear CPSC Re: CPSIA Section 108:

Are baby-/child-care wipes, lotions and/or creams advertised as aiding rest or sleep covered under Section 108 of the CPSIA?

E.g.,

“JOHNSON'S® BEDTIME BATH® is formulated with NATURALCALM™ essences - a special blend of calming aromas. Use this gentle cleanser for your baby's nighttime bath as part of a 3-step nightly routine to help her sleep better”

“Use JOHNSON'S® BEDTIME® MOISTURE WASH™ in a warm bath as part of our 3-step nightly routine, anytime you want to help your baby sleep.”

<http://www.johnsonsbaby.com/product.do?id=6&productID=6&filterID=0>

Aveeno “Calming Comfort Lotion”

**CALMING COMFORT™ LOTION**

This rich lotion contains lavender and vanilla — natural ingredients known for their calming and relaxing properties. Combined with natural colloidal oatmeal, known for its ability to retain moisture and soothe skin, this fast-absorbing formula helps heal and protect baby's dry, delicate skin, leaving skin feeling soft, smooth and healthy. Used along with a gentle massage, this soothing lotion helps calm and comfort babies before bedtime, naptime, or anytime baby's a bit fussy. It's even gentle enough for newborns and babies with sensitive skin.

<http://www.aveeno.com/productDetail.do?prodid=3645>

Clear Essence product:

**Baby Oil with Eucalyptus and Menthol**

The baby oil with Eucalyptus and menthol is specially made for babies of color. Drive the sniffles away, and relieve clogged airways with the natural scents of eucalyptus, rosemary and menthol. Help your baby breathe easy, and sleep calm.

<https://clearessence.com/featureditem.php>

... etc.

Thanks so much for your consideration of my inquiry.

-Ken Bogen  
 (former Chairman, U.S. CPSC CHAP on DINP)

---

**Kenneth T. Bogen, DrPH DABT** Managing Scientist  
 Exponent, Inc. <http://www.exponent.com>  
 500 12th Street, Suite 220  
 Oakland, CA 94607  
 (510) 268-5048 [kbogen@exponent.com](mailto:kbogen@exponent.com)

**Stevenson, Todd**

---

**From:** Dick Liou(Tinker Minds Inc.) [tinkerminds@verizon.net]  
**Sent:** Tuesday, February 17, 2009 11:27 AM  
**To:** Section 108 Definitions  
**Cc:** 'Dick Liou(Tinker Minds Inc.)'  
**Subject:** Comments on CPSC's draft guidance re CPSIA section 108 - phthalates

Dear CPSC Staff Members,

I applaud you for the amount of effort and attention you've put into addressing this complex regulation. Your tremendous amounts of efforts are obvious and the need for clarification is just as great because the implications of how you regulate will dramatically affect millions of people. In my particular case the effect is total financial devastation with little hope of justice since our product was manufactured more than a year before the law was even considered. Due to our limited distribution capability we have held inventory that was essentially our only asset. Now our only asset has been reduced to zero value. Yet regardless of my own situation, I would very much like to help you do the "right" thing with this almost impossible task.

Please consider the following analyses and suggestions. They are written with utmost respect for the work you've already done, even if the tone doesn't sound like it:

1) General approach –

- a. Applying the definition of toys and playthings from the ASTM classification system appears initially to be a straightforward and logical approach. However, I believe it has mislead you down a treacherous and needlessly complex web that can only get worse with each new product that doesn't fit neatly into the ASTM classifications. In your own statements you raised three such conflicts.
- b. By following the ASTM classification, you are immediately trapped with having to include certain subcategories and exclude the others. In some cases because the classification is not mutually exclusive, you end up asking exactly the question of why a tricycle is different than a similar ride-on vehicle with 4 wheels, or even a bicycle, or a unicycle. This is a laughable example of trying to dissect and exclude. This is the same pattern that the infinitely complex tax code goes through. You do not have the resources of the IRS and even if you did, this isn't the best way to go.
- c. Using another example, if fruit is defined as the outgrowth of a plant, then peanuts could also be classified as a fruit. Imagine the devastation if peanuts were made available to people with a deadly allergy to them without closer regulation on labeling. On the other side of the coin, fungus is generally considered not edible. Imagine prohibiting sales of all fungus, which would include all edible mushrooms. Substitute the word "fruit" with "sporting equipment" in the first example and "fungus" with "toys" in the second and you'll see how these faulty reasoning spawn themselves. These are not perfect examples but serve only to illustrate the danger of following a different type of classification scheme. The ASTM classification appears to focus more on outer form and function, whereas I believe your task is to prevent the "toxins" from entering the body. They are very different sets of considerations; mixing them up would be counterproductive at best, and negligent and/or harm causing at worst.

2) Alternative approach – There is another approach which would not pigeon-hole yourselves into unnecessary complexity. Instead, consider the following points:

- a. The intent (spirit) of the law is to protect children by:
  - i. First defining a minimally acceptable level of "toxins". This is already done although you'll find that many people are perplexed at why the definition without real scientific proof or human cases to refer to. Europeans have adopted this level since the '80s; simply ask if there are less cases of human reproductive failure there than here? Highly doubtful.
  - ii. Second, to protect children (whether 0-3 or 4-12) from harmful exposure. Here's where it gets sticky and shows the lack of considerations by congress when they hastily passed the law. The real question you should be asking is how a "dangerous" product delivers the danger to the children. By answering this question you will be better able to draw guidelines that are solid in

principle and can be dissected logically down the path without having to second-guess your own work.

- iii. It is here that it becomes crucial for you to decide whether the word “toy” as written was the word of significance. How about the word and idea of “usage”? When a child plays, he can use anything as a toy. Without casting too large of a net, it is reasonable and common sense driven that anything made specifically for children’s use should be considered by this law. By excluding anything not labeled as a toy you allow word-play to determine safety instead of actual physical contact and usage pattern.
- iv. Currently there are 3 examples of such unnecessary and confusing conflicts from your proposal. Again this is a result of following the ASTM classification.
  1. Example #1 – if regulation sized basket balls, etc. are excluded, or inflatable furniture is excluded, then why is inflatable building blocks not excluded? I am most familiar with this inconsistency because of our product which uses the same vinyl, has the same contact surface, and resembles inflatable seats and cushions, or can be assembled to be used as basketball hoops as in sports equipment. The only difference is that our product is modular and can be interconnected to build different structures. Yet because it promotes imagination, active and creative playing, it is labeled a toy. How absurd is that? The same degree of physical contact exists for the inflatable balls, chairs, and building blocks, so why shouldn’t the same standard apply?
  2. Example #2 – Books for children whether with or without vinyl serve the purpose of education and entertainment. If the issue is the covering, then the level and degree of topical contact should be assessed instead of labeling the entire class of children’s books as hazardous.
  3. Example #3 – Art and Craft material and model kits are every bit as plaything as any other toy. Ask a child to identify toys and no doubt he will consider them as playthings/toys. Some of these items are even more dangerous than “toys” since they have sharp, detachable, hard plastic parts as well as glue that can be ingested. By excluding these items the regulatory effort becomes negligent in protecting children.

3) Toys that can be placed in a child's mouth –

1. There are plenty of products designed for older children who do not chew small parts. Take away the small parts of these products and they may no longer function. The question isn't whether all toys that have small parts are dangerous but differentiating between those designed for older kids with clear labeling for such purpose.
2. Take for example, the requirement for 5cm length. One must ask whether this was based on anthropometric data of children’s mouth opening, or was it some arbitrary number that sounded nice. In the same vein, the age 12 stated in the CPSIA law is also arbitrary. No two twelve year old children have the same developmental maturity or play preferences that are exactly the same. A toy that could be dangerous to one is totally not to the other. The same item could be totally safe for a 12-year old but presents danger to a 14-year old who chooses to use it. Here again the intended usage pattern needs to be the predominant factor for weighing the inherent danger.
3. What happened to parents' own responsibility of watching over their children and making sure anything of hazard is not placed in their surrounding? Can government really take over this aspect of parental responsibility? How about using “reasonableness” as a guideline instead of regulation?

4) In Sum,

- a. There are several ways that danger can occur. The most obvious is via contact. You’ve done a great job in identifying this as primary vs. secondary contact in the Childcare article section. Why not leverage your own deduction from there? Consider these questions:
  - i. How does the child come into contact with the substance? Is it direct or indirect? Is it easily or difficult? Is it frequent or infrequent? To what degree is the contact? Is it minimal as in topical (touch)? Or enwrapped as in wearing? Can it be chewed, and why would it be chewed (color, texture, flavor, etc.)?

- ii. Once these questions are used to classify the degree of danger, you would have developed a system that is both practical and less complex. At the same time, you would avoid splitting hair between a tricycle and a power wheel.
- iii. Some examples to clarify my points:
  1. Using this logic, whether the manufacturer labels something as “also facilitates sleeping” on a swing becomes immaterial. This is because common sense tells us that a duck is a duck and not a chicken that can swim. In other words, no matter what the spin doctor labels the product with, its actual usage determines the type and degree of contact with the child. It is this latter that needs to concern your regulation. Foreseeable contradictions and potential law suits can arise out of inaccurate or too narrowly defined terminology. On the other hand, no one can argue about the usage pattern and the degree and type of physical contact a product has to its intended user.
  2. If the toxic substance cannot be reached by the child in the normal course of usage, I think the answer is obvious that the product should not be regulated. One could argue that the product could potentially be opened and the substance became within contact range. This is a weak and impractical argument. A certain amount of caution and responsibility is required by guardians to prevent this from happening. The law seeks reasonableness in most of its ruling. No product can be totally fool-proof because the economics simply won't allow it.
  3. Is the contact frequent or infrequent? And what type of contact are we talking about? If the contact is merely topical for a short instance (as in a case of a puppet theater that may contain phthalate but is used primarily as a stage and not as something to enwrap oneself with), then it is reasonable to consider a different treatment. Otherwise one risks condemning perfectly good toys to unnecessary extra steps of precaution and elevated cost of production and retail price, which then deprives children of less means. The same reasoning applies to cribs, bibs, beds, etc. where the contact is direct, frequent, and for long durations of time. Again common sense dictates that the latter presents more and consistent exposure of the toxin to the child than a plastic kitchen set where child's imagination is enriched but the plastic is not in constant touch.
- iv. The answer to your section J is rather simple when using this approach. Almost all the items you listed present a higher level of danger because of their level and frequency of contact with the child. To exclude some of them because of linguistic or classification methods based on general categories would be negligent in your effort to protect children.

I hope this is of some help. As a parent I certainly appreciate your efforts. As a manufacturer who is now financially bankrupt because of the NY ruling I can only hope that others will not become victimized when they have always been vigilant about child safety. This development has destroyed my faith in the American dream and justice system. Nevertheless I appreciate your taking the time to read my comments and thank you for this opportunity.

Best regards,

**Dick Liou**

AeroBlocs, a Division of Tinker Minds, Inc.

[TinkerMinds@verizon.net](mailto:TinkerMinds@verizon.net)

tel (781) 652-9854 fax (781)240-0202

The patented **AeroBlocs by Tinker Minds™** is a proud winner of the:

\* Dr. Toy's 10 Best Active Products 2007

\* Dr Toy's 100 Best Children's Products Award for 2007

\* Nat'l Association for Gifted Children-Parenting for High Potential Recommendation

\* Dr. Toy Smart Play/Smart Toy Product of Excellence Award 2005

\* iParenting Media Award Winner for 2005 Excellent Products

\* 2005 Parents' Choice Recommended Award

**Stevenson, Todd**

15

---

**From:** eanderson50310@aol.com  
**Sent:** Tuesday, February 17, 2009 1:09 PM  
**To:** Section 108 Definitions  
**Subject:** Children's consignment stores

To Whom It May Concern:

My name is Emily Anderson and I own and operate a children's consignment store in Des Moines Iowa. I seem to be reading and rereading the information that has been posted about the new lead laws and children's items - however I do not seem to be getting anywhere with it. I haven' read anywhere if second hand/consignment stores are included in this new law? If you could get back to me I would greatly appreciate it, I don't know if I am breaking the law by coming into work everyday? Thank you for your time...

Sincerely,

Emily Anderson  
Before It Was Yours...

---

**A Good Credit Score is 700 or Above. See yours in just 2 easy steps!**

**Stevenson, Todd**

---

**From:** Orca Coast Playground [info@orcacoastplay.com]  
**Sent:** Tuesday, March 03, 2009 12:20 PM  
**To:** Section 108 Definitions  
**Subject:** Comments regarding Lead and Phthalates Ban on Play equipment / ORCA

Dear CPSC,

I write this email on behalf of myself and Orca Coast Playground Ltd. based in Vancouver British Columbia.

Orca is a highly recognized and respected Indoor Playground (SCPE) manufacturer, designer and installer with over 140 installations throughout North America and an estimated 15,000,000 children using our equipment every year.

Orca Carries full product liability insurance and has the best known safety record in our industry.

Orca utilizes as many North American made products for raw materials for all of its products and faces oncoming competition from its local competitors of whom are currently utilizing Chinese made raw materials on a daily basis as well as an onslaught of foreign competitors.

Orca utilizes the best raw materials and are forced to reduce our net profit to be competitive. We use the highest possible standards as the FOUNDATION of our success.

We are IN FAVOR of the recent ban on Phthalates and LEAD in PLAYGROUND EQUIPMENT. Since we found out more information regarding PVC vinyls that we formerly utilized we have been making major changes, raising our pricing while others have not. We have already developed a new decking system that meets the recent rulings requirements and are still facing lower priced competitors that have not changed nor addressed this major and important new legislation. Vinyl (PVC Vinyl) is a major component in indoor playgrounds. We know right now we are the only manufacturer compliant with the ruling and encourage the legislation to press forward to keep these contaminates out of our children.

Please feel free to contact me anytime for more information on what products others are using knowingly . To date Orca is looking at a useless stock material of PVC of about 20k that we are prepared to absorb to be compliant, others should too.

Sincerely,



Bill Dunbar / President  
Orca Coast Playground Ltd.  
Vancouver, Canada  
Tel: 604.357.3344  
Mobile: 604.719.6277  
Fax: 604.464.5514  
email: [b.dunbar@orcacoastplay.com](mailto:b.dunbar@orcacoastplay.com)  
web: [www.orcacoastplay.com](http://www.orcacoastplay.com)

*"Built for Kids, by Parents who **love** them"*

**Stevenson, Todd**

---

17

**From:** David and Hillary CRANDALL [crandallquiver@q.com]  
**Sent:** Tuesday, March 03, 2009 12:19 PM  
**To:** Section 108 Definitions

Can the final guidelines please address whether CD, DVD, VHS, cassette, etc. media items (including the cases, printed inserts, discs, etc.) intended and marketed for children are considered "children's toys or child care products" and thus covered by the limits in this law?

Or are these media items not covered by this law?

Thank you.



March 4, 2009

**VIA FACSIMILE AND  
FIRST CLASS MAIL**

Office of the Secretary  
Room 502  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

2009 MAR 10 AM 7:23

***Comments: Notice of Availability of Draft Guidance Regarding Which  
Children's Products Are Subject to the Requirements of CPSIA Section  
108; Request for Comments and Information***

To Whom It May Concern:

Several of my clients are affected by the recently-enacted requirements of the Child Safety Protection Act (CSPA) prohibiting the manufacture or sale of certain children's products that contain phthalates. On behalf of those clients, I submit these comments on the February 12, 2009 document titled "Notice of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information."

**General** -- The CPSIA generally makes it a prohibited act, among other things, to manufacture for sale, offer for sale, distribute in commerce or import into the United States any toy that contains one or more of six enumerated phthalates in concentrations in excess of .1%. The ban on three of the phthalates applies to toys without qualification, while a provisional or interim ban of three others only applies to toys that can be placed in a child's mouth. The statute defines a toy as "a consumer product designed or manufactured for a child twelve years of age or younger for use when the child plays," but notably does not define the verbs "play" or "use" or the interrelationship between the two. Given the vagueness of the terms in the statute, almost any item that a child twelve or under uses or wears while playing could conceivably be considered to be a toy. Thus, it is incumbent on the Commission to clearly define the scope of this requirement.

**Toys** -- The definition of a toy in section 3.1.72 of ASTM F 963-07,<sup>1</sup> when taken in conjunction with the exceptions to that definition which appear in section 1.4 of that standard, provides sufficiently clear guidance on the proper scope of the phthalate requirements as they relate to toys. Thus, to avoid the confusion that will inevitably arise if the Commission interprets the mandatory ASTM F-963 07 standard as having one definition of a toy and section 108 of the CPSA another, the Commission should use the ASTM formulation as a common definition for both. Using these provisions of F 963-07 for that purpose would also have the benefit of providing consumers, manufacturers, retailers, and testing organizations with reasonably well known, understood and accepted criteria that would enable them to determine which products are toys that are subject to the phthalate provisions of the law and which ones are not.

I recognize that, even within the parameters of ASTM 963-07, gray areas exist as to what products are covered by the definition of a toy. For example, as General Counsel Falvey's letter of October 17, 2008 acknowledges, children's wearing apparel generally is not considered to be a toy because it is not intended to be played with by a child. The opinion goes on to recognize that Halloween costumes are subject to the Flammable Fabrics Act and not the Federal Hazardous Substances Act (the primary statute that addresses hazards associated with toys and other articles intended for use by children), and further observes that costumes that children wear in theatrical productions are also not children's toys as that term is used in section 108 of the CPSIA. On the other hand, according to the October 17 letter, dress or play costumes sold as part of a toy set and intended to be worn during play "could be considered" to be toys under that section. These distinctions are valid ones, and any final guidance that the Commission issues on phthalates should incorporate them. Specifically, if the agency has historically regarded certain items as wearing apparel rather than toys or has made similar regulatory interpretations defining what a toy is, it should continue to do so in the guidance documents. Thus, theatrical, Halloween, and party costumes and garments would not be subject to the phthalate requirements while costumes designed or manufactured for use in traditional children's dress-up play would.

---

<sup>1</sup> I understand that ASTM F-963-08, a revision to ASTM-F-963-07, has been published and has gone into effect. Under section 106 of the CPSIA, ASTM F-963-08 will replace ASTM F-963-07 as a mandatory standard 180 days after ASTM notifies the Commission of the revision. However, since the provisions of ASTM F-963-08 that are relevant to these comments remain unchanged from the same provisions of the prior version, any reference to ASTM F-963-07 in these comments includes both the previous 2007 standard and the 2008 revision.

**Art Materials** -- The phthalate guidance document also requests comments on whether particular art materials, model kits, or craft items should be regarded as toys that are subject to section 108 of the CPSIA. As is noted above, the Commission needs to provide bright line guidance on topics like these so that affected firms can understand their obligations under the law. As the guidance document recognizes, ASTM F-963-07 in part generally excludes art materials and model kits from its scope. In part, this is because those products are subject to an independent regulatory regimen under the Labeling of Hazardous Art Materials Act (LHAMA) that requires that they be evaluated by a board certified toxicologist to assure that they do not present chronic toxicological hazards. Products determined to present such hazards must be appropriately labeled. If art materials that present such hazards are intended for use by children, they are technically banned under the Federal Hazardous Substances Act and the Commission may seek to enjoin their distribution or purchase for use by children in pre-kindergarten, kindergarten, or grades 1 through 6 -- in other words, children who are generally twelve years of age or younger. Given the existence these requirements which directly address the chronic hazards that phthalates allegedly present, we believe that products subject to the LHAMA requirements should be entirely exempt from the phthalates provisions. However, if the Commission determines not to adopt this approach, we recommend that the agency rely on ASTM F-963-07 and exclude from the requirements of section 108 art materials, hobby and craft kits, and model kits in which the finished item is not primarily of play value.

**Balloons** -- The guidance document describes balloons as an example of products that might be subject to section 108. While some balloons may fit within this definition if they are included along with another toy or come in packages that bear labeling indicating that they are articles with which to play, others such as those in bulk packages are intended for use generally as decorative items. We believe that the final guidance document should properly distinguish between decorative balloons and those that are designed for use by children during play. We note that section 24(b) of the Child Safety Protection Act requires that packages of balloons bear labels warning that they are not intended for use by children under eight years of age which, in itself is recognition that these items are not toys.

**Test Procedure** -- Test Method: CPSC-CH-C1001-09 lays out the test procedure that the Commission's testing laboratory will use for the analysis of phthalate content. Unlike the test procedures for evaluating lead, the phthalate procedure uses the entire weight of a children's product as the denominator for measuring the concentration of phthalates enumerated in section 108 of the CPSIA. We believe that this approach follows the plain

language of section 108 of the CPSIA which states that the concentration limits apply to any children's toy or child care article. Its validity is further confirmed by the fact that Congress expressly included a reference to "parts" of children's products in section 101 of the CPSA, but also expressly chose not to do the same either in identifying toys and child care articles subject to the phthalate limits or in the definitions of toys and child care articles themselves. In view of the language of section 108, any final test procedure should maintain the existing method for calculating phthalate concentrations outlined in the current version of Test Method: CPSC-CH-C1001-09.

I appreciate the opportunity to comment on behalf of my clients. Please contact me if you need additional information.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael J. Gidding". The signature is written in a cursive style with a large, prominent initial "M".

Michael J. Gidding

**From:** Lawson, Gary [GLawson@GENFOAM.COM]  
**Sent:** Thursday, March 05, 2009 11:13 AM  
**To:** Section 108 Definitions  
**Cc:** Toro, Mary; Whitfield, Troy; Ward, Sean; Dewgard, William  
**Subject:** CPSC's Request for Comments - CPSIA section 108

Hello,

This email is to address the CPSC request for comments concerning CPSIA section 108.

A. Provide comments on staff's approach to determining which products are subject to the requirements of CPSIA section 108. Explain.

COMMENT; The CPSC approach seems to not address the intent of this requirement; it includes many items that have no potential for phthalates or lead content because of the manufacturing materials used in the product yet it excludes many items used by children 12 and younger that have a high probability of phthalates and lead content just because the items are not considered toys. One example of this is blow molded Halloween pumpkins or Easter baskets – these items are manufactured from PP and/or PE materials and are used by children for less than 2 weeks out of a year yet they require full testing and certification but computer keyboards, mouse, I-pods, cell phones, video games and controllers, etc. are normally use by children for hours each day and have many PVC and Vinyl components and these items require no testing for phthalates and lead. Another example would be items that children are in contact with every day but are not considered toys so they are not tested for these chemicals; vinyl flooring, carpet, furniture, vinyl shower/bath curtains, light switches, power outlets, painted lamps, fans, component remote controls, TV's, CD's, DVD's, plates and silverware, windows, doors, automobile interiors, school bus interiors, etc.

D. What are the foreseeable consequences of the staff's approach?

COMMENT; Additional consumer cost thru unnecessary and redundant testing of products than have never had phthalates and lead content because of the materials used; If a manufacture had 25 different products manufactured from the same materials and sold to 10 different stores he would be required to complete at least 250 certified test for these chemicals before he could ship all of these products.

D. The staff proposes that tricycles are not covered by section 108, because they are excluded by ASTM F963. However, the staff has generally regarded 3- and 4-wheel ride-ons, including "Big Wheels," as toys. What distinguishes ride-on toys from tricycles?

COMMENT; Big Wheels and other similar type products are tricycles – they fall under ANSI Z315.1-2006 American National Standard for Tricycles – Safety Requirements and on page 11 of this standard figure 1 – examples of tricycles clearly shows a Big Wheel type tricycle. These types of tricycles are manufactured from Polyethylene and/or Polypropylene plastic and use stickers instead of paint for graphics. The most common use of phthalates is in PVC type plastic (vinyl, flexible PVC, etc.) and for lead it is more likely to be in paints and PVC plastic. We have manufactured a Big Wheel type tricycle along with a smaller 3 wheeled version for many years; these products have never had any phthalates or lead content because of the type of plastic use in these products yet we are required to have certified testing for these chemicals. This only adds cost for the consumer but does not provide any additional value.

J. Should the following articles be regarded as subject to the requirements of section 108? Why or why not? Should they be classified as toys, child care articles, or not included? n. Wading pools

COMMENT; I do not think any type of pool should be considered a toy – a toy is something you play with but in a pool you play in the water, not with the pool. All pools no matter what size require 100% competent adult supervision and is so stated with safety warning labels on the product, in the instructions and on the packaging as required by the ASTM F2666 standard and the ANSI/APSP-4 standard.

N. Should pools required to meet the standard be defined as those pools that do not require a filter and the addition of chemicals for maintenance?

COMMENT; Even small pools without a filter/pump system will require chemicals for maintenance or you will need to replenish the water often. I do not think any pool should be considered a toy because of the risk of danger associated with this type of product and the need for adult supervision and knowledge of all the safety requirements. If you must try to separate pools into two types then I think the Filter/Pump system would be a starting point.

Sincerely, Gary Lawson  
757-857-0153 ext. 243



20

RECEIVED OF THE LEGAL  
DEPARTMENT OF THE STATE

2009 MAR -6 P 1:26

**LEGAL DEPARTMENT**  
Phone: 920-478-2191  
Fax: 920-478-4200  
e-mail: bob.burns@trekbikes.com

VIA Email & First Class Mail

March 2, 2009

U.S. Consumer Product Safety Commission  
Office of the Secretary  
4330 East-West Highway  
Bethesda, MD 20814

Email: [section108definition@cpsc.gov](mailto:section108definition@cpsc.gov)

RE: February 23, 2009 Federal Register Notice Requesting Comments to  
Proposed CPSC Guidance on Implementation of the CPSIA Sec. 108

Dear Ladies & Gentlemen:

Trek Bicycle Corporation is one of the largest suppliers of high quality bicycles to the independent bicycle dealer market segment in the United States. We own and maintain bicycle manufacturing facilities in Whitewater and Waterloo Wisconsin together with distribution facilities in California, New Jersey and Wisconsin. We employ approximately 1,187 people in the United States and we are one of only a few bicycle companies that still produce some of our products domestically. We offer a full line of high quality bicycles to the American consumer from the racing bicycle ridden by Lance Armstrong to the tricycle under the Christmas tree. We submit these comments today in response to the CPSC's question II.D specific to tricycles:

The staff proposes that tricycles are not covered by section 108, because they are excluded by ASTM F963. However, the staff has generally regarded 3 and 4 wheel ride-ons, including "Big Wheels" as toys. What distinguishes ride-on toys from tricycles?

Trek Bicycle Corporation agrees with the staff's proposal that non-toy tricycles should be excluded from the scope of section 108. We believe products such as the Trek Trikester (pictured below) should be excluded from section 108 for the reasons stated below:

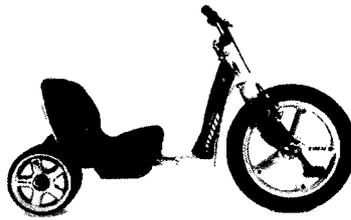
1. These products are not cheap plastic ride-on toys. They are high quality cycles made with steel frames and pneumatic tires;
2. Plastic products such as the Big Wheel may retail from \$25 to \$75, while the Trikester has an MSRP of over \$200 and is intended not as a toy but as a first bicycle for children to learn to steer, pedal and balance;

3. These products have many of the attributes which a child will encounter when he/she begins to ride his/her first two wheeler, such as pneumatic tires, and in some cases hand brakes;
4. For example, in the Trek line up, the Trikester is intended for children ages 3-4 and is intended to transition the child to the Trek Mod (pictured below) which has hand brakes and an MSRP of \$189. The Mod is intended for children ages 4-6 and is in turn intended to transition the child to a true two wheeler such as the Trek Float (pictured below).

Accordingly, these products are not toys. They are high quality early childhood cycles and sporting goods.



TRIKESTER



MOD



FLOAT

Sincerely,

Trek Bicycle Corporation

A handwritten signature in black ink, appearing to read "Robert Burns".

Robert Burns  
General Counsel

**Stevenson, Todd**

---

**From:** Suzander [suzander735@earthlink.net]  
**Sent:** Monday, March 09, 2009 12:57 PM  
**To:** Section 108 Definitions

I agree that we as adults should do what we can to protect our children. Infants and very young toddlers should definitely have strict guidelines for their clothing and toys and these definitions seem reasonable. However, I think the guidelines should affect newly manufactured items and not those already in personal use as it should be an individual choice to use an item or not.

I think these guidelines have been taken too far and will be affecting far more people than just children. My very slender 12 year old has long since stopped chewing on his clothes yet I can no longer recycle his clothes at the local consignment store. I can no longer donate them to charity or give them away without fear of being fined. I guess I will have some very nice rags to clean with as the only other option is to put them in the trash. This means I pay twice, once to purchase the clothing items and then to dispose of them as my town will be charging \$1.50 a bag come this June (an incentive to RECYCLE in order to REDUCE waste). I cannot sell my handmade touchy/feeling blankie or diaper bags at fairs or craft coops; the elderly woman can no longer donate hand knit mittens, booties and hats to the church fair. What are we to do?

Suzanne Anderson  
Plymouth, MA

**Stevenson, Todd**

---

**From:** Chris Kalberer [chris@jjitoys.com]  
**Sent:** Monday, March 09, 2009 2:02 PM  
**To:** Section 108 Definitions  
**Subject:** Playground Equipment  
**Attachments:** Brochure EMAIL 09.pdf

To Whom it may concern,

We have a line of "toys" that are all designed to get kids off the couch. I would not say they are all sporting goods. It could probably be argued that they are all playground equipment. Our Jump Rope is one that could fall into both categories, but I'm sure someone could argue against that. We have had all of our product tested already, but I am looking towards the future and establishing our regular testing schedule and wanting to know if all of our product needs to be included?

Thank you for any help you may be able to provide. I have attached a brochure so you can see what products we have.

Chris Kalberer  
*Fitness & Fun Coordinator*



4345 Hedstrom Way  
Chico, CA 95973

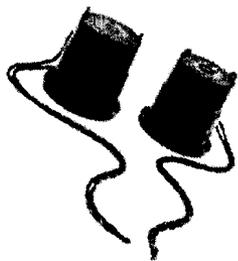
800 767 3173 x 1310 t  
530 345 3568 f

[chris@jjitoys.com](mailto:chris@jjitoys.com)  
<http://www.jjitoys.com>

# Classic Fun

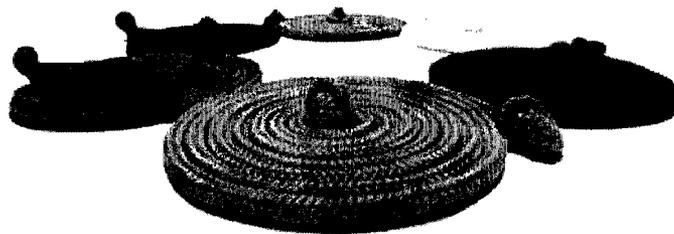
from around the world.

At Just Jump It, we bring you the simplicity of toys that have spent the rest of time. Our durable updates of timeless classics employ modern materials while retaining the magic of the original.



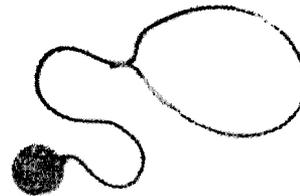
## stepper

Steppers have long been great toys for kids to improve balance and coordination. Our durable Stepper sets are a modern take on this classic toy. The sharp edges, rust issues and stability problems of home-made "can steppers" are eliminated by molding our own design with a flared base and anti-slip top textures. We use high quality braided polypropylene line for the handles to ensure durability and a good grip for little hands.



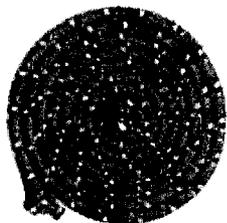
## jump ropes

The Just Jump It approach to jump ropes is pretty simple: high quality, polypropylene line, making a beautiful, pliable & durable jump rope. In addition, Just Jump It jump ropes are double-braided, resulting in a hefty 3/8" diameter line that can swivel on itself, respond smoothly to speed changes, and give solo and double dutch jumpers perfect loops. No need for troublesome sleeves or handles. These are the real deal, and they're even machine washable.



## skipper

Our Skipper is an extremely fun and affordable toy that challenges kids in all three of our core design goals: agility, balance and coordination. The Skipper features a colorful molded end-ball and the same high quality braided polypropylene line that is the hallmark of our product line. We have added a semi-rigid sleeve to the ankle loop to lower rotational friction and to make it easier for kids to put the toy on.



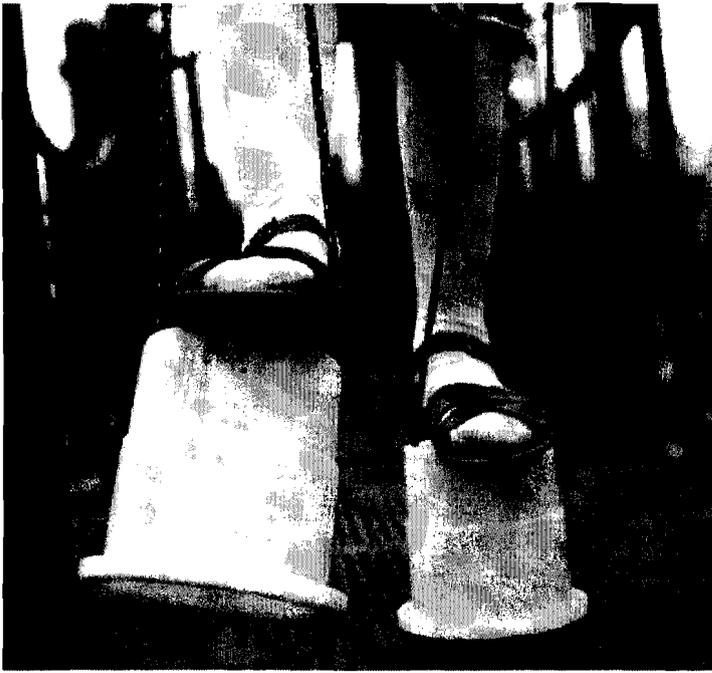
## CONFETTI!

[www.jjitoys.com](http://www.jjitoys.com)

agility balance coordination

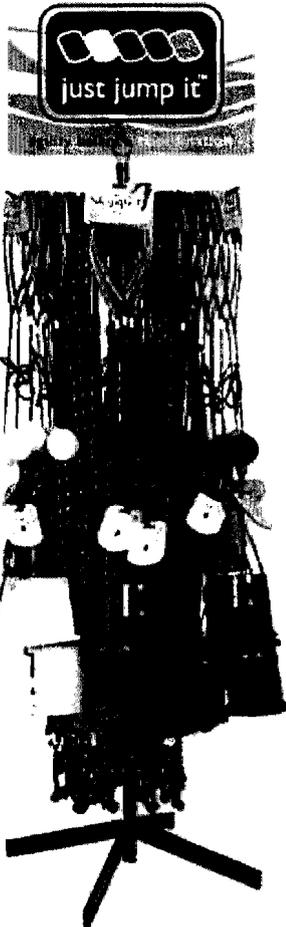
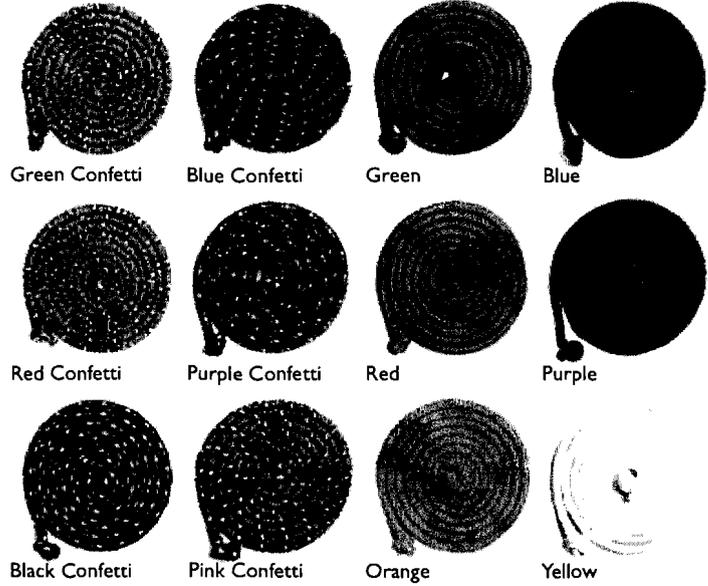


4345 Hedstrom Way  
Chico, California 95973  
800.767.3173 p  
530.345.3568 f



## jump ropes

Solo ropes are 8' and doubles are 16'.

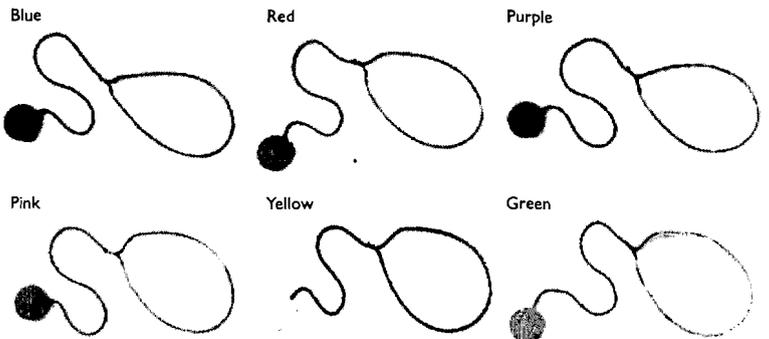


**TOP RUNGS**  
(36) 8' jump ropes  
AND  
(36) skippers

**BOTTOM RUNGS**  
(12) 16' jump ropes  
AND  
(12) steppers

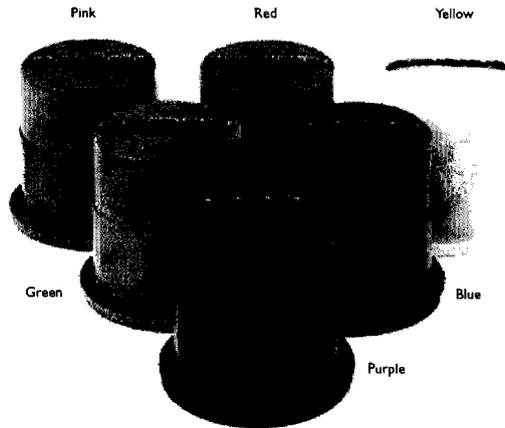
## skipper

Six different ball/rope color combinations are available:



## stepper

Stepper sets come in six bright colors:



## Retail Rack

The Just Jump it free-standing rack allows a full selection of our products, worth \$600, to be effectively displayed within three square foot of floor space.



Comments should be filed by e-mail to [section108definitions@cpsc.gov](mailto:section108definitions@cpsc.gov)

**Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information.**

***I. General Approach***

**A. Provide comments on staff's approach to determining which products are subject to the requirements of CPSIA section 108. Explain.**

**Does it result in clear guidance? Why?**

**Do you have suggested changes to the approach? Why?**

As the manufacturer of children's products made from natural and un-dyed gemstones, sterling silver, cotton, and hemp material, there are no phthalates used in the manufacturing process. Requiring my products to be tested for something used to make plastics more pliable is nonsensical, as there are no plastics used in my product lines.

**B. Is there an alternative approach that should be used? Please describe.**

It makes sense to exclude products that do not contain plastics from this required testing, even when those products fall into the Child Care or Toy category.

**C. Is there any additional guidance on products that are subject to section 108 that would be useful to manufacturers? Describe.**

**D. What are the foreseeable consequences of the staff's approach?**

If there is no exclusion for non-plastic products, then it will force thousands of businesses to shut down; the phthalate test is extremely expensive and unnecessary for products that would not possibly contain pthalates!

There needs to also be an allowance for component level testing of pthalates. This test is extremely costly and the labs charge at least \$500/component. Once a component has been tested, it is extremely wasteful to require it to be tested again and again for each variation of the product when the component has been altered.

I cannot comment on the rest of your questions, as it does not relate to my business and I do not know how to respond.

Thank You,  
Karen Boateng  
Little Gems Jewelry  
<http://www.littlegemsonline.com>  
ph: 925-914-2229

## Stevenson, Todd

---

**From:** Karen Blum Boateng [karen@littlegemsonline.com]  
**Sent:** Monday, March 09, 2009 2:59 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information  
**Attachments:** Comments\_Pthalates.doc

Attached, please find my comments regarding the Pthalate testing requirement of the CPSIA Section 108

Thank You,

Karen Blum Boateng  
Little Gems  
<http://www.littlegemsonline.com>  
<http://www.hyenacart.com/littlegems>  
<http://littlegems.etsy.com>  
ph: (925) 914- 2229

Carol Pollack-Nelson, Ph.D.  
Independent Safety Consulting  
13713 Valley Drive  
Rockville, Maryland 20850  
301-340-2912  
pollacknel@comcast.net

March 10, 2009

Mr. Todd Stevenson  
Office of the Secretary  
Consumer Product Safety Commission  
4330 East-West Highway  
Bethesda, MD 20814

*Re: Notice of Proposed Availability of Draft Guidance Regarding  
Which Children's Products are Subject to the Requirements of the CPSIA  
Section 108; Request for Comments and Information*

Dear Mr. Stevenson:

I appreciate the opportunity to comment on CPSC's draft guidance regarding which products should be subject to the phthalate requirements of the CPSIA. I have read the CPSC's February 12, 2009 notice and wish to recognize the staff's tremendous efforts to apply these requirements in a meaningful way.

As I mentioned in previous correspondence, I am a human factors psychologist specializing in the field of product safety. I work for both industry (manufacturers and industry groups) and consumer representatives (consumer advocacy groups and attorneys in litigation) equally. Regardless of who my client is, I use the same criteria for making any hazard determinations or determinations of intended user. The comments that I offer in this letter are not on behalf of any client. Rather, they represent my opinions as an independent safety professional.

Below are my comments:

1. Sporting Goods –

I agree with Staff's suggestion to exempt sporting goods and also agree that there is a distinction between sporting goods and toy versions of these items.

Children and adults of all ages play sports and use sporting goods. Sporting goods come in different sizes to allow different aged users to use equipment that is

appropriately sized (i.e., not too heavy or too large for them to handle). Size is not a determinate of whether a product is a sporting good or a toy. Other factors are useful in making this distinction:

- **Materials** - Sporting goods are composed of similar materials regardless of the age group for which they are intended. For example, there are aluminum and wood bats of different sizes. There are baseball mitts of different sizes. There are soccer goal posts and volley ball nets of different sizes. Balls for different sports also come in different sizes and when they are intended as a sporting good, use similar production materials (e.g., leather or simulated leather).

Toy versions of sporting goods use softer materials, such as foam or plastic bats, plastic soccer goals, cloth-covered basketballs, and plastic balls. These materials are used by younger children as they learn to play the game. Young children are not aware of the rules of how to play the game or how to play it carefully (e.g., may swing a bat near other children), and these softer materials are necessary.

- **Toy-like Function/Response** - A toy version of a sporting good may also differ in function and/or response. For example, a toy bat might make a funny sound when it hits something. In this capacity, the bat is designed to be responsive to the child's movements in ways that are unrealistic and unrelated to playing the sport. The sound feature is intended to amuse the child. Bats intended as sporting goods do not have sound features. Sporting goods that function or respond in a manner that deviates significantly from the function or response of an adult version of the product may be considered to be a toy.

It is important to recognize that sporting goods include products used for a variety of purposes and in a variety of settings. Some sporting goods are used for team sports (e.g., baseball, t-ball, soccer), while others are used for individual sports (e.g., biking, tennis). Some are used in a competitive setting while others are used for backyard play (e.g., volleyball or badminton). In my opinion, these products are all sporting goods if similar in function and materials to adult-type sporting goods.

I have considered whether embellishments, themes and color variations affect whether or not a product is a toy or a sporting good. At this time, I think these decorative features alone do not determine whether or not something is a sporting good versus a toy. Rather, I think it is the material of the product and how that product functions that are the overriding factors. For example, an orange, cloth basketball with the Harlem Globetrotter logo would be considered a toy whereas an orange synthetic rubber basketball with the same logo could be considered a sporting good.

## 2. Promotional Items –

Where a product is distributed is important and, based on the CPSIA, can influence the age group for whom the product is intended. During the CPSC Lead Meeting in November, I presented the example of a wood bangle bracelet that was not juvenile in appearance, but when sold in a “Tweeners” store would be considered “primarily intended for children 12 and younger.” That same bracelet, when sold in a department store location, would not be considered to be primarily intended for children. In that example, the place where the product was sold was a key factor in determining the age of intended users.

Where a product is sold or distributed is relevant to the phthalate regulations as well. According to the regulation, the way in which a product is marketed is a key factor influencing the intended age of a product. Thus, a football with a company logo that is distributed to an adult-only conference would not be “intended” for children. That same football, sold at a toy store (without the company logo) or distributed at a child’s birthday party, would be intended for children.

Promotional items that are distributed at adult gatherings are intended for adults, not children. However, in some cases, the likely and ultimate users of the product may be children if the adult passes the article to a child. That will not always be the case, however, it is foreseeable that this might happen, for certain products. Some classes of products are considered to be appropriate for “all ages.” Included in this classification are items like simple, soft balls and basic stuffed animals<sup>1</sup>. These objects are commonly recognized by consumers as suitable for all ages *and* associated hazards are not likely to be appreciated by the lay consumer. For this reason, I believe it would be prudent for the Commission and manufacturers to eliminate phthalates from future production of certain promotional items that may be considered by consumers to be both suitable and harmless (i.e., no apparent risks) play items for young children who are still mouthing. In fairness, however, I do not think that products existing in inventory should be subject to this regulation since, per the standard, they are not technically intended for children.

## 3. Books –

I agree with the Commission’s guidance regarding books. We should distinguish between books with paper pages and those with plastic pages. While both may be intended for young children, books with paper pages are not likely to be given to a child for independent play if that child is still mouthing or unable to turn pages without tearing

<sup>1</sup>This is not to say that all stuffed animals and balls are considered appropriate for all ages. Fragile, pricey and highly adorned stuffed toys that are promoted as collector’s items are likely to be kept from young children or used decoratively. Similarly, hard balls are not likely to be considered appropriate for all ages.

them. The potential for destruction of the pages is obvious to the caregiver. However, soft, plastic books that are intended for infants who are mouthing (e.g. plastic pages with foam stuffing) are likely to be considered appropriate by consumers to give to a young child who is mouthing and associated hazards are not likely to be appreciated.

#### 4. Fragile objects –

Fragile objects that are intended for direct or indirect use by a child and need to be handled with care are similar to paper books. Products that are obviously fragile and that can be destroyed by an infant or young child who is exploring objects not only through mouthing, but also through shaking, banging and dropping items on the floor are not likely to be given to a young child who is at risk of mouthing for independent play.

One example of such a product is a DVD for a child's computer game. While the DVD is intended for use by a child when he or she plays, a DVD is obviously fragile. Parental oversight is likely until the child is capable of using it reliably without breaking it or mouthing it. The potential risk of the DVD breaking in a young child's clumsy fingers or even in their mouth is obvious. For this reason, I believe that certain (obviously) fragile items should be exempted from the CPSIA.

#### 5. Inflatable Toys –

Some inflatable toys are likely to be present in the home in a deflated state, such as a beach ball or other relatively small inflatable that may be taken out to the beach or pool (e.g., water wings). Per the CPSC guidance, these objects should be subject to the phthalate regulation as it is foreseeable that they will be chewed on by young children.

Other inflatable objects are not likely to be deflated and left in living spaces of the home where young children will have ready access. These include large-scale inflatables (e.g., seasonal items like large snowmen or pumpkins, large scale inflatable slides, etc.). Such items are too big to leave in a living room or play area and are likely to be stored elsewhere when deflated. These items should not be subject to the phthalates requirement.

#### 6. Child Care Articles –

The Staff distinguishes between primary and secondary child care articles. Primary products are those intended for direct use by the child aged three and younger to facilitate sleep or feeding or to help such children with sucking or teething. I completely agree. Primary products include bibs, pacifiers, a sipper cup, crib teething rail.

Secondary products – those that are used by the caregiver to facilitate feeding or sleeping – should not be covered by the phthalate regulation since the child is not likely to be given these items to play with or for independent use.

Other products that are used to hold a child such as bouncers, swings, and strollers may be used by the parent to facilitate sleep and these are used directly by the child. However, only those components that are likely to be mouthed should be subject to phthalate requirements. For example, a belt buckle (which should be securely around the child, but may not be), shoulder straps, and structural members that can be mouthed by the child when seated in the product should be compliant. However, other aspects of the stroller or seat (e.g., handle bar that the parent pushes or uses to lift the seat; the top portion of the swing where the controls are located) would not be mouthed by the child and therefore, should not need to be compliant.

Some strollers and baby seats are marketed as places where babies may nap and, therefore, would be covered by the CPSIA phthalate requirement. However, babies and young children are just as likely to fall asleep in seats or strollers that are not advertised as intended for facilitating sleep. That is because babies and young children will fall asleep in any seat when they get tired, particularly a seat that has motion (e.g., swing, stroller, bouncy seat). While awake and in a stroller or other seat, the child is likely to try to mouth any object that is easily accessed. This includes components that can be picked up and placed in the mouth or components that are positioned near the child's head. Any components that can be mouthed by the child when seated should be compliant with the phthalate regulations.

## 7. Toys That Can Be Placed in the Mouth –

The CPSIA considers a toy to be a “toy that can be placed in the child’s mouth” if “any part of the toy can actually be brought to the mouth and kept in the mouth... so that it can be sucked and chewed.” Additionally, if any part of the toy is less than 5 cm in any dimension, then it can be mouthed.

While it is true that anything less than 5 cm in any dimension can potentially fit inside the mouth, I do not believe that this criterion, alone, is appropriate for determining if something will be mouthed. The concern with phthalates is that a young child will chew or suck on something. Having one dimension that can fit inside the mouth is not the only criteria for determining whether or not this behavior will occur. The weight and size of the product are also important factors.

Certain large-scale or heavy objects may have an edge or depth that is less than 5 cm in depth, but are not likely to be mouthed by users. For example, a puppet theater, large-size inflatable, a play table for interlocking or molding clay, and a doll house are all examples of relatively large-sized products that are not likely to be mouthed. A major reason for this is that intended users (ages three and older) are not likely to be mouthing

their toys. Additionally, despite having a dimension that is 5 cm or less, the products are not easily brought to the mouth and chewed on due to their weight and size.

The practical accessibility of a component also influences whether or not it will be brought to the mouth. Some product components have a dimension that is 5 cm or less, but that cannot be practically be inserted into the mouth. For example, a trampoline mat has a depth of less than 5 cm and its top surface is accessible, however, the portion that is 5 cm or less cannot be brought to the mouth. (The trampoline mat is used for illustrative purposes; a trampoline would likely be exempted since it is a sporting good).

8. The age at risk – The above comments lead me to my final and most important point. The CPSIA, as written, misses the mark in identifying products that pose a realistic risk of injury to children due to phthalate exposure. The children at risk are those who are mouthing. We have known for decades now that children under three mouth objects. As I noted in comments submitted previously (December 8, 2008), children younger than three years of age handle everything and place objects in their mouths, often indiscriminately, for purposes of oral exploration, to alleviate discomfort due to teething, and/or to soothe them. Research studies published over the last several decades have consistently reported that mouthing behaviors and choking incidents most often involve children younger than three years. For this reason, the CPSC Small Parts Regulation bans small parts in toys and other objects that are intended for children younger than three years.

Mouthing behavior drops off as children become more mobile and also as they are able to utilize their products beyond simple sensory experiences (i.e., touching, shaking, mouthing) and cause-effect actions. I recently studied CPSC choking fatality data involving children, for the years 2000 through October 2008. This data showed that choking-related fatalities increased until three years of age.<sup>2</sup> While choking-related fatalities continue to be reported in three and four-year-olds, the rate of incidents declines beginning at three years of age. By around five to six years of age, choking fatalities on non-food items occur relatively infrequently.

Other studies investigating choking and mouthing behaviors in children have produced similar findings. The Department of Trade & Industry in the UK investigated choking risks to children younger than four years (1999) and found that “[n]on-fatal cases show a peak between ages one and two years and then the number of cases declines steadily” (p. 12). Eighty-two percent of non-fatal choking incidents involved children aged two and younger. “The decline is even more pronounced for fatalities; 56% are under one and only 6% over 36 months...” (p.2).

<sup>2</sup> This data, initially reported in my December comments, has since been updated, leading to the revisions noted here.

A subsequent study published by DTI (2002) investigated mouthings behavior of children up to five years of age. The observational research involved 236 children aged one month to five years and reported on how long children mouth pacifiers, fingers, toys, and other objects. Researchers found that “[m]aximum daily mouthing on toys peaks at 6-9 months and then generally decreases as children get older...” (p. 6). The report further states:

The findings of this study reinforce the fact that the high risk age for choking incidents is up to 1 year as having the greatest exposure to choking hazards both in terms of mouthing time and the number of objects mouthed. The study also shows that children up to 3 years of age are at risk from the items they mouth (p. 12).

In 2002, the Centers for Disease Control published the findings of their study, *Nonfatal Choking-Related Episodes Among Children – United States 2001* ([www.cdc.gov/mmwr/preview/mmwrhtml/mm5142a1.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5142a1.htm)). This study reviewed nonfatal choking data for children through 14 years of age using data from the CPSC NEISS hospitals. “In 2001, an estimated 17,537 ... children ages  $\leq$  14 years were treated in EDs for choking-related episodes... Rates were highest for infants aged  $<1$  year and decreased with age” (p.2). Further, 65.1% of the non-fatal choking incidents studied involved children ages two and younger. Another 17.2% involved three and four-year-old children. (Data is pooled for ages five through nine, and 10-14).

The Commission has been striving to determine which products should be exempted from the CPSIA requirements. For example, it has been suggested that exclusions noted in ASTM F963 should be exempted. The extensive efforts to identify products that should be exempted from the CPSIA would not be necessary if the regulation were written in a manner that is consistent with the published literature on choking and mouthing behaviors. The phthalate regulation should strive to protect children up to three years of age who are likely to mouth and chew on their toys and related child care articles. At the most, the regulation might cover toys and child care articles intended for children up to and including four years. To include children beyond that is contrary to the mouthing data and, in my opinion, will lead to unnecessary waste and cost that I imagine will eventually be passed on to the American consumer.

I greatly appreciate your consideration of my comments on this subject. If I am able to provide you with further clarification or assistance as the Staff develops a greater understanding of the issues, please do not hesitate to contact me.

Respectfully submitted,

Carol Pollack-Nelson

## Stevenson, Todd

---

**From:** Carol Pollack-Nelson [pollacknel@comcast.net]  
**Sent:** Tuesday, March 10, 2009 4:22 PM  
**To:** Stevenson, Todd  
**Subject:** March 10, 2009  
**Attachments:** March 10, 2009.doc

Dear Todd,

Attached please find my comments in response to: *Notice of Proposed Availability of Draft Guidance Regarding which Children's Products are Subject to the Requirements of the CPSIA Section 108; Request for Comments & Information.*

Thanks & best regards,  
Carol

Carol Pollack-Nelson, Ph.D.  
Independent Safety Consulting  
13713 Valley Drive  
Rockville, Maryland 20850  
301-340-2912 w  
301-728-9133 c  
[pollacknel@comcast.net](mailto:pollacknel@comcast.net)

**Stevenson, Todd**

25

**From:** Lee Shuey [leeshuey@yahoo.com]  
**Sent:** Wednesday, March 11, 2009 5:58 PM  
**To:** Section 108 Definitions  
**Subject:** children's books

Less than ten years ago, I was involved in the startup of a community library. We accepted donations of books in order to build a collection. Many of the books received were children's materials, and often they were printed before 1985. We also received games, puzzles, stuffed animals, and other objects for the children's area. Without these donations, we would have had no library.

While we have since been able to raise enough money to purchase new materials, we still have some of the older materials on our shelves. Having to pull all of the pre-1985 items from our shelves will leave those shelves much emptier and cause the staff to use valuable time which should be spent with the patrons, program planning, community involvement, etc. The library, of course, has no money for testing.

I feel that this legislation is a severe handicap for public libraries. Community libraries often have very limited budgets. It is not fair to handicap them even further through unfunded mandates that they remove materials from their already limited collections or pay to have expensive testing done. While lead in children's toys can be a serious problem, the likelihood of a child ingesting enough lead from a book is negligible.

Please register my protest against this legislation.

Andrea Lee Shuey

Personal Care  Products Council  
Committed to Safety,  
Quality & Innovation

March 13, 2009

BY ELECTRONIC MAIL TO [section108definitions@cpsc.gov](mailto:section108definitions@cpsc.gov)

Office of the Secretary  
Consumer Product Safety Commission  
4330 East-West Highway  
Bethesda, Maryland 20814

RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information (74 Fed. Reg. 8085 (Feb. 23, 2009))

To Whom It May Concern:

The Personal Care Products Council (the Council) hereby submits these comments on the draft guidance referenced above. The Council (formerly the Cosmetic, Toiletry, and Fragrance Association) is a national trade association that has been representing the cosmetic and personal care products industries since 1884. The Council has more than 600 members whose businesses formulate, manufacture, distribute, and market personal care products. The personal care products industry is a global industry with more than \$250 billion in annual retail sales. Our members manufacture or distribute the vast majority of personal care products sold in the United States.

Among other things, the draft guidance requests comments on whether a number of products should be subject to section 108 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), which bans the use of certain types of phthalates in children's toys and child care articles. Section 108 of the CPSIA (codified at 15 U.S.C. § 2057c); 74 Fed. Reg. at 8060, § II.J. Our comments are limited to the specific issue of whether "shampoo [or other cosmetic] bottles in animal or cartoon character shapes" should be subject to section 108. 74 Fed. Reg. at 8060, § II.J(k). For the reasons set forth below, these cosmetic containers are not subject to section 108.

Section 108 prohibits the sale, distribution or importation of any "children's toy" or "child care article" that contains concentrations of more than 0.1 percent of DEHP, DBP or BBP. It also temporarily prohibits the sale, distribution, or importation of any children's toy that can be placed in a child's mouth or child care article that contains concentrations of more than 0.1 percent of DINP, DIDP, or DnOP. That section defines a "child care article" as "a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with

sucking or teething.” Section 108 defines a “children’s toy” as “a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.” The Commission’s draft guidance lists four factors to consider when determining whether a product meets the definition of a “children’s toy”:

- whether the intended use of the product is for play, including a label on the product if such statement is reasonable;
- whether the product is represented in its packaging, display, promotion or advertising as appropriate for use by the ages specified;
- whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified; and
- the Age Determination Guidelines issued by the Commission staff in September 2002.

Cosmetic containers are neither “child care articles” nor “children’s toys.” As a threshold matter, cosmetic containers do not meet either definition because they are not “consumer products” subject to the Commission’s jurisdiction. “Cosmetics,” as defined in the Federal Food, Drug, and Cosmetic Act (FDCA), are excluded from the definition of “consumer product” within the meaning of the Consumer Product Safety Act and the CPSIA. *See* 15 U.S.C. § 2052(a)(5)(H); 74 Fed. Reg. at 8058. The FDCA defines a cosmetic to include “articles used for components” of any cosmetic. 21 U.S.C. § 321(i). Containers that hold cosmetics, whether in “conventional” shapes or the shapes of animals or other characters, are a component of the cosmetic product. The FDCA gives the Food and Drug Administration (FDA) explicit jurisdiction over health hazards associated with the composition of the containers of cosmetics. 21 U.S.C. § 361(d). FDA has also long asserted jurisdiction over mechanical and other hazards associated with the containers of cosmetics as components of cosmetic products. *See, e.g.*, 21 C.F.R. § 740.11(a)(1) (FDA regulation identifying detailed labeling requirements for self-pressurized cosmetic containers). Given that FDA has jurisdiction over cosmetic containers, and has exercised same, and the statutory basis for treating containers of cosmetics as cosmetic “components” exempt from the definition of “consumer product,” we believe that cosmetic container composition is subject solely to the jurisdiction of FDA and cannot be subject to section 108 of the CPSIA.

In addition, cosmetic containers clearly are not “child care articles” as defined above, as they are designed and intended to facilitate bathing, cleansing, and beautification, and not “sleeping,” “feeding,” “sucking” or “teething.” Shampoo bottles, in particular, facilitate bathing and cleansing. As the Commission has recognized in its draft guidance, products associated with “bathing” are “not subject to section 108.” 74 Fed. Reg. at 8060.

These containers also do not qualify as “children’s toys” within the meaning of the statute because they are not designed or intended for use by children when they play. While it may be the case that a cosmetic product’s container – that is shaped, in whole or part, like an animal or other character – may be attractive to children, such visual appeal does not render the product a “toy” within the CPSIA definition. Even if the label or marketing of the product indicates that the product is appropriate for use by children 12 or younger –

for instance, children beyond the toddler years may shampoo their own hair – the relevant question is whether the product is for use during play. Shampoo, soap, and bath gel containers are not designed or intended for play. They are designed or intended for the functional purposes of protecting from adulteration, and facilitating the dispensing of, the shampoo, bath gel, or other cosmetic contained therein. Cosmetic containers are in some ways similar to art materials that are excluded from the ASTM F963’s definition of “toy” because the finished product “is not primarily of play value.” 74 Fed. Reg. at 8059. Cosmetic containers are generally designed and intended to be discarded after the cosmetic is fully dispensed; thus, although containers are manipulated during use of the cosmetic, after consumption of the cosmetic substance the container is no longer intended to be manipulated. In this way cosmetic containers are also different in critical respects from “bath toys,” which the draft guidance considers toys. *See* 74 Fed. Reg. 8059. Bath toys are designed and intended to encourage play and have enduring play value, whereas cosmetic containers are not designed or intended for play and they are designed and intended to be discarded after cosmetic use. Many cosmetic products accordingly bear statements to the effect of “Not intended for use as a toy,” “for use under adult supervision,” “keep out of reach of children,” “discard container when empty,” and so on. Further to this point, bath toys are typically sold in the toy section of a store whereas cosmetic containers in novelty shapes are sold in the personal care products section.

We appreciate the opportunity to submit comments on this draft guidance. Please let us know if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frances K. Wu", with a long, sweeping horizontal line extending to the right.

Frances K. Wu  
Associate General Counsel

**Stevenson, Todd**

---

**From:** Jon Hunsaker [jhunsaker@net-venture.com]  
**Sent:** Saturday, March 14, 2009 5:00 PM  
**To:** Section 108 Definitions  
**Cc:** Heather Hunsaker  
**Subject:** Section 108 definition request for comments

Office of the Secretary, Consumer Product Safety Commission,

In regards to the proposed definition of consumer products that fall under the Consumer Product Safety Improvement Act of 2008, I think you have done a very good job in defining consumer products that should fall under the new regulations. I would propose that in addition to crib teething rails, that all cribs and consumer products designed for the use in a crib be subject to the this act, this would include mattresses, mattress covers, sheets, bedding etc... These items have a direct correlation to facilitating sleep in children under the age of three and should qualify as a child care article. Another proposed item would be all strollers whether designed to facilitate sleeping or not. This way, when parents choose a less expensive model due to financial restraints, the parent is going to have the same protection as one who afforded a more expensive model that allows reclining or advertises the facilitation of sleep or eating. It would also eliminate the issue of trying to find a stroller that would not subject children to higher levels of Phthalates.

This regulation should also fall under some indirect items that facilitate feeding such as tableware, spoons, bowls, plates, etc... If we are going to propose a ban on bibs because they would be chewed on or used to keep the baby clothes dry during teething, then we must also consider consumer products that are going to directly facilitate feeding toddlers and infants.

Lastly, I believe certain indirect products need to be classified as "Child care articles". This would be breast pumps and breast shields/pads. Although these items do not directly facilitate the feeding of children, they do aid indirectly facilitate in their feeding. The last thing we want to do is expose children's breast milk to direct contact with Phthalates associated products. These items do come into contact with the child's milk during pumping and expose the mother's nipple to Phthalates in which the child will put in his or her mouth when feeding. These items then too should fall under the proposed definition of "child care articles"

Thank you for your time

Jonathan and Heather Hunsaker  
6610 23<sup>rd</sup> St NE  
Tacoma, WA 98422

**Stevenson, Todd**

28

---

**From:** Richard Wolkin [rwolkin@colgatekids.com]  
**Sent:** Tuesday, March 17, 2009 11:29 AM  
**To:** Section 108 Definitions  
**Subject:** re: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108  
**Attachments:** comments to the CPSC2.doc

Dear Sir or Madame,

Please find attached my comments with regard to the notice published in the Federal Register/ Vol. 74, No. 34 pages 8058-8061. This is the first time I or anyone from our company has ever commented to the CPSC and I am therefore unsure of the correct format. Hopefully, my comments are appropriate.

Thank you for your consideration.

Sincerely,

Richard H. Wolkin, Vice President  
Colgate Mattress Atlanta Corp.

February 27, 2009

Richard H. Wolkin  
Colgate Mattress Atlanta Corp  
779 Fulton Terrace SE  
Atlanta, GA 30316

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

Dear Sir or Madam:

Colgate Mattress Atlanta Corporation has been manufacturing crib mattresses for more than 54 years. We are a small family owned manufacturing company located in Georgia. We are writing this letter in order to convey our comments with regard to the interpretation of the term “child care article” as defined by Section 108(e)(1)(c) of the Consumer Product Safety Improvement Act (CPSIA). It is our belief that crib/toddler mattresses should not be subject to the phthalates provisions of the act. Herein, we also make certain suggestions with regard to the phthalates test method found on the CPSC web site.

We support the general approach of the CPSC with regard to classifying various products which might be considered “child care articles” within the act. In order to simplify my comments, I have chosen to term these **Class I, Class II, Class III, and Class IV** as follows: (1) primary products (**Class I**) (2) products that are not necessarily in direct physical contact with the child, but are in close proximity to the child, such as cribs, crib mattresses, toddler mattresses, mattress covers, or mattress pads that may or may not facilitate sleep (**Class II**) and (3) secondary products with which the baby has no direct contact (**Class III**) and (4) secondary products that are intentionally designed to also facilitate sleep (**Class IV**).

In other Sections of the CPSIA, some of the products listed in Class II are singled out. Cribs in sections 102(a)(3), 104(c) and 104(f) and 107(B), and crib mattresses in 107(B). We believe the lack of a specific reference to specific products in section 108 allows the CPSC to use its discretion with regard to which products are or are not subject to the phthalate restrictions noted in section 108. For all classes of products, especially those in **Class II**, the class in which many of Colgate’s products fall, we believe two questions are important with regard to answering whether Congress intended them to be within the scope of the CPSIA section 108 definition of “child care article.” Does the product (1) actually “facilitate” sleep or the

feeding of children age 3 and younger and (2) Does the product pose any potential health risk should it contain phthalates?

According to the original Consumer Product Safety Act (15 U.S.C 2051-2089), the first stated purpose of that act was “to protect the consumer against unreasonable risks of injury associated with consumer products.” By being somewhat vague in the definition of which products are encompassed within section 108 of the CPSIA, Congress is simply reaffirming the charter of the CPSC to be the key government agency that determines the potential risk associated with a particular consumer product and then to take appropriate action.

The CPSIA does formally call for a temporary ban on three specified phthalates in the specified consumer product class and instructs the CPSC to conduct studies on their potentially harmful effects. If after such studies are conducted the CPSC does not determine there to be credible reason to consider these three phthalates harmful, the CPSC has been instructed to reinstate their potential use in these consumer products. Congress, thereby, was simply reaffirming that the CPSC is the regulatory government agency which is responsible for assessing the risk associated with these types of chemicals.

As stated in your detailed description of the **Class IV** products listed above, “newborns and young infants spend the majority of their time sleeping and, therefore, are likely to sleep anywhere.” Thankfully, because of other safety considerations which you have helped publicize, most parents have heeded the CPSC’s advice and do put their newborns and infants to sleep in cribs with mattresses that fit snugly. Should a product be commonly found within the crib environment and contain phthalates, it should be assessed to determine if it might pose a risk to the child. Such an assessment should take into account the concentration of phthalates in the product and also the accessibility of these chemicals to the child. According to the Center for Disease Control and Prevention (CDC), in the Third National Report on Human Exposure to Environmental Chemicals published in 2005, page 253, “People are exposed through direct contact with products that contain phthalates or through food that is in contact with packaging that contains phthalates. For the general population, the oral route of exposure has been considered a major route.” The fact of the matter is the cover of a crib mattress is not directly mouthable in normal use by a child. This was very clearly stated in the European Commission document titled “Guidance Document on the interpretation of the concept “which can be placed in the mouth” as laid down in the Annex to the 22<sup>nd</sup> amendment of Council Directive 76/769/EEC”. In this document the commission points out that the cover is not directly mouthable in normal and foreseeable use conditions. “The edges and corners are not accessible for mouthing by design (the mattress must fit snugly in the cot to avoid entrapment risks). The mattress is covered in normal use and the surface is sufficiently taut (by design --to avoid suffocation risks) to prevent PVC from being mouthed through the sheet.” The surface of a crib mattress is simply not in

direct contact with the infant, cannot be mouthed by the child and, therefore, even if this mattress cover is made with PVC containing phthalates, it poses no risk to the child.

The crib mattress serves as the subsurface component of the preferred environment for the parent to secure the child for sleep. In a real sense this activity is facilitating the sleep of the parents, because it makes it easier for the parents to relax knowing their infant is safe. The use of PVC affords the parents additional benefit because this surface material is easily sanitized should the child soil the mattress as small children are prone to do. Furthermore, PVC is durable and affordable. When children are put to sleep in a crib with an appropriately fitted mattress, they are actually separated from the mattress minimally by a sheet and usually also by a mattress pad. The potentially harmful exposure to phthalates from the mattress is simply nonexistent. Therefore the crib mattress should be not subject to the restrictions stated in this section of the CPSIA.

For the remainder of this letter, I wish to turn my attention to the proposed testing methodology. I do not know phthalate chemistry, nor can I claim any training in the separation technology inherent in the procedures explained on your web site. I simply have had extensive training in the scientific method and believe that the procedures described by you are valid and possibly the best for certain products, but not all. I wish to explain the methodology that Colgate is currently using in order to insure compliance with section 108 for your consideration as a third alternative.

Colgate is recognized for manufacturing some of the highest quality crib mattresses. Our typical innerspring is composed of various layers. These layers include the spring, insulating layer(s), cushioning layer(s), a fire barrier and the cover. We manufacture over 80 different models. Some of these different models use the same covers but vary from other models of mattresses due to one or more of the following: density of foam, coil count and/or gauge of steel in the spring units, type and number of cushioning layers, and type and number of insulating layers. Due to the sheer number of models we manufacture, we searched for a method that would insure our compliance and yet still control our costs within reason. We were aware that the PVC materials that we use on to manufacture the covers for most of our models was the one component that we had to be the most concerned about with regard to the CPSIA section 108. We recognized that certain components would not contain phthalates e.g. the innerspring itself. We fully agree that these types of metal components can be excluded from the testing procedure in all regards except for their weight contribution to the final product. When we first began our quest to insure compliance we were unsure about other components such as the cotton, the fire barrier, and the insulator pads we use. Due to the lack of reliable information, we therefore tested these components individually. We found all of these components to be below the detection limits when using an independent third party testing facility. We confirmed that the vinyl sheeting that we use to cover most of our mattresses was the one component that might contain one of the six phthalates listed in the CPSIA and subsequently began restricting our testing

protocol to each batch of vinyl and/or vinyl laminate that we purchased. In our case, we have been insisting that our suppliers certify that the vinyl we have been purchasing since June of 2008 have less than the 1000 PPM of any of the six banned phthalates. To date we have confirmed this for all of the vinyl thus far purchased with this specification. We accepted that the CPSC and the legislation mandated the necessity for us to spot check our suppliers. However, since none of the other components have been found to contain phthalates, we believe that we should be allowed to simply test each vinyl shipment to insure compliance. Testing the "batches" of the finished products seems redundant and extremely cost prohibitive. By insuring that no single component exceeds the specified publicized limits of 1000 PPM for the finished product, we are in fact exceeding the specifications mandated simply because all of the components do contribute to the total weight of the product. Furthermore, our ability to define the batch or run appropriately would become virtually impossible should we need to monitor the origin of every component in our finished product. Although I accept that by law this is a finished product specification, simple logic dictates that if all components except for the cover can reasonably be expected to not have any detectable phthalate concentrations, the finished product must be in compliance if the vinyl or other material used to manufacture the covers is shown to be compliant.

Thank you for this opportunity to share my comments and for considering them before finalizing this regulation.

Sincerely,

Richard H. Wolkin, Vice President  
Colgate Mattress Atlanta Corp.



Via Electronic Mail

March 18, 2009

Mr. Todd Stevenson  
Office of the Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Notice of Availability of Draft Guidance Regarding  
Which Children's Products are Subject to the  
Requirements of CPSIA Section 108

Dear Mr. Stevenson:

We write on behalf of the Footwear Distributors and Retailers of America ("FDRA")<sup>1</sup> and in response to the request for comments regarding which children's products are subject to the requirements of Section 108 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), 74 *Federal Register* 8058 (February 23, 2009).

FDRA's interest in this issue is somewhat circumscribed. The General Counsel's opinion dated October 17, 2008 is explicit that footwear is not considered "a toy within the meaning of Section 108, unless it has some play value, e.g. a shoe made for a doll." This is understood by FDRA and its members that, as a general rule, Section 108 is not applicable to children's footwear.

However, the draft guidance asks whether the presence of cartoon characters and electronic devices suggests that these devices may be considered toys. FDRA strongly believes that the mere presence of a cartoon character does not mean that a product is a toy because the characters are attractive to children. Many products depict cartoon characters, from furniture to bedding to T-shirts; but these products are not toys. If an electronic product has secondary play value (a cell phone with a game function) it may be reasonable to view it as a toy. The presence or absence of cartoon characters does not alter the function and should not affect the characterization of the cell phone as a toy.

Further, cartoon characters appeal to adults and children older than 12 years. Some cartoon characters appeal only to adults. The determination of whether a particular cartoon character appeals to children 12 years of age or younger is highly subjective and for that reason should not be a consideration.

---

<sup>1</sup> FDRA is a trade association representing an estimated three-quarters of all footwear sales in the United States through its retailer, importer, distributor and manufacturer members.

Some children's footwear depicts cartoon characters. This does not mean that the footwear is a toy. Section 108 (e)(1)(B) defines a toy as a "product designed or intended by the manufacturer for a child [ ] for use by the child when the child plays." Footwear is not designed or intended for use in play. Footwear, whether or not it depicts cartoon characters is designed to protect the child's foot and to provide traction and support. It is not designed as a play thing.

FDRA requests that the final guidance affirm the General Counsel's opinion that footwear is not considered a toy and that the presence of cartoon characters is not a factor in determining whether a given product is a toy.

Please feel free to contact me if you have any questions on this submission.

Sincerely,

Peter T. Mangione

V7845492.1

## **Stevenson, Todd**

---

**From:** Peter Mangione [ptmangione@fdra.org]  
**Sent:** Tuesday, March 17, 2009 2:33 PM  
**To:** Section 108 Definitions  
**Subject:** FDRA Submission on Section 108 Definitions  
**Attachments:** CPSC FDRA Submission on Scope of 108, Mar 17, 2009.DOC

Dear Mr. Secretary --- Enclosed pls find the comments of the FDRA on the above captioned request for comment.

Pls contact us if you have any questions.

Best regards.

Peter T. Mangione  
President  
Footwear Distributors and Retailers of America  
1319 F Street, NW, Ste 700  
Washington, DC 20004  
P: (202)737-5660 x15  
F: (202) 638-2615  
M: (703)328-0802  
[www.fdra.org](http://www.fdra.org)



## **Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information**

The CPSC has requested public comment on their draft approach for determining which products constitute a "children's toy or child care article" and therefore are subject to the requirements of section 108 of the CPSIA. In response to this request, the following comments have been compiled by the International Playground Equipment Manufacturers Association (IPEMA). We agree with the Staff's approach and provide technical data and specifics that will support the current approach.

The Staff's approach is good and we believe it carries out the Congressional intent to recognize the exemptions to ASTM F963-07. The staff approach provides clear guidance on what products are subject to the phthalates requirements of section 108. The approach of using the definition of a toy from ASTM F963, Standard Consumer Safety Specification for Toy Safety, including the current list of exclusions, is practical and carries out Congressional intent. Playground equipment is on that list of exclusions and the following reasons provide support for that approach and exclusion.

1. Congress in the CPSIA provided that ASTM F963-07 became a mandatory CPSC standard on February 10, 2009. Congress is presumed to have been aware of the provisions of ASTM F963 and as it did with flammability requirements, could have specified that the playground equipment exclusion did not apply. By not doing so, it is IPEMA's view that Congress intended the playground equipment exclusion in ASTM F963-07 to apply when this voluntary toy standard became a mandatory standard.
2. IPEMA recognizes that playground equipment is a children's product and accordingly, playground equipment must be manufactured to comply with the ban of lead in paint and surface coating materials. Further, the ASTM standard for public playground equipment, F1487, Standard Consumer Safety Performance Specification for Playground Equipment for Public Use, has a requirement in section 5.4 that playground equipment meets the requirements of 16 CFR Part 1501 and not have any small parts. With this requirement, all public playground equipment that meets the requirements of ASTM F1487 will not have any small parts that could be mouthed or manipulated which is the primary focus of the interim ban in section 108(b) of the CPSIA.
3. Public playground equipment is structural in nature and is a much larger size than toys, the primary focus of section 108 and ASTM F963. Unlike toys, the support structure of playground equipment remains stationary while the activity takes place.
4. Generally, public playground equipment is not manipulated or played with as a toy would be. The activity and interaction of the child with playground equipment is comprised of active movement such as climbing, sliding, crawling, creeping, running, swinging, rocking, spinning, jumping, bouncing or any combination thereof.

5. A child's normal interaction with public playground equipment does not include any mouthing activities, like bringing equipment into the mouth, which is the typical method of transfer associated with the proposed hazards with phthalates.
6. We are not aware of any history of medical health related issues linked to materials used on public playground equipment.
7. Public playground equipment is in a different product category than toys. And the safety guideline published by the CPSC is evidence of that. Public Playground Safety Handbook, publication #325, is an entire publication dedicated to this class of products.
8. During the public meeting on Phthalates, CPSC staff mentioned using the definition of 'play' from the Webster's dictionary. We believe that definition is far too broad to apply to this legislation. This definition encompasses toys, sports and literally any object that can amuse. It also can be applied to a much broader age range than children 12 years or younger. We would suggest the staff refer to the Webster's definition of another term, and that is 'toy' which is the term the statute uses. This term is generally thought of in relation to the age range of children, which is the focus of the statute, and it gives a more definitive direction for applying this legislation. It says that a toy is something for a child to play with, something diminutive. Public playground equipment is structural and large, not diminutive. It is something the child plays on, not with. We believe this definition can provide the staff some very good guidance for the staff's approach for determining which products constitute a "children's toy".

The Staff also requested comments on what types of playground equipment should be excluded. Based on the reasons listed above, any public playground equipment that meets the requirements of ASTM F1487 should be excluded from the requirements of section 108. For your reference, our association, IPEMA, administers a product certification program that is operated by a 3<sup>rd</sup> party validator. This program certifies that equipment meets all the requirements of ASTM F1487.

**Stevenson, Todd**

---

**From:** Denise Calabrese [info@ipema.org]  
**Sent:** Wednesday, March 18, 2009 12:30 PM  
**To:** Section 108 Definitions  
**Cc:** 'Denise Calabrese'; 'Martin Speece'; 'Susan Wolf'; ASSOCED@ipema.org; 'Bill Clapp'; 'Curtis Cleveland'; Kathy Rauhut; 'Keith Sacks'; 'Lloyd Reese'; 'Milton Chappell'; Randy Watermillier; 'Richard Hawley'; Scott Liebelt; 'Ted Illjes'; 'Tim Ahern'; 'Tom Norquist'  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108  
**Attachments:** IPEMA Comments on playground exclusion from sect 108 \_3\_ \_2\_.pdf  
**Importance:** High

Good day –

In response to the call for comments regarding playground exclusion from Section 108 of the CPSIA, the International Play Equipment Manufacturers Association (IPEMA) respectfully submits the attached document. Should you have any questions regarding the comments being submitted, please do not hesitate to contact our organization. We appreciate the opportunity to provide guidance on this issue.

Sincerely,

Denise

\*\*\*\*\*

*Denise R. Calabrese, Executive Director*  
*IPEMA*  
*4305 North Sixth Street, Suite A*  
*Harrisburg, PA 17110*  
*(717) 238-1744*  
*[info@ipema.org](mailto:info@ipema.org)*

**Stevenson, Todd**

---

**From:** Geoff Jones [geoffreysjones@yahoo.com]  
**Sent:** Friday, March 20, 2009 12:47 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

*I. General Approach*

A. Provide comments on staff's approach to determining which products are subject to the requirements of CPSIA section 108. Explain.

The guidance thus far on what products are in and out of scope with regard to toys has been good. It seems reasonable that toys, as defined in ASTM F963, encompass what toys should be tested for phthalates. Using known standards that have been in the industry for years are a good baseline to use since industry has been involved in the creation and changes to these standards and there is a well understood process for proposing and incorporating changes to these standards. Guidance on child-care articles has not been as smooth, however the staff's effort to provide some guidance to the industry has been appreciated. Understanding that the timelines and resources available have been less than satisfactory, it would have been better to provide definition of product types (i.e. classes of products) that are in or out of scope.

a. Does it result in clear guidance? Why?

Any guidance provides clarity since the law is written so ambiguously. Specific guidance on products (i.e. by product type) rather than general guidance would be preferred. The general guidance is still open to ambiguity and uncertainty.

b. Do you have suggested changes to the approach? Why?

In question "J" below, the commission is making references to specific types of product: Bibs, Pajamas, Mattress covers, etc. These references provide insight into specific product types that are easily understandable to the public. One area that provides significant confusion is in just determining if you have a children's product and then if that product is a toy, a mouthable toy or a child-care article. Being more specific on what products fall into these categories would be very useful since it is a struggle to determine the correct application of the laws in a manner that will allow the manufacturer to adequately test a product without the need to test it unnecessarily.

B. Is there an alternative approach that should be used? Please describe.

The manufacturer of Play Sand, knows exactly what he/she sells. If the Commission were to tell the manufacturer that Play Sand is a children's toy they would know exactly what they would need to test it for. As it stands right now, there isn't clear guidance on where this product falls, which would explain why you are asking for input on this product in question "J". If the staff and the Commission are confused about the disposition of a product you can imagine how confused the public and the manufacturers are confused about a product. The commission should provide clear guidance on specific product types so that confusion about specific products is minimized.

C. Is there any additional guidance on products that are subject to section 108 that would be useful to manufacturers? Describe.

Providing clear guidance on what product types fall into what category. E.g. wooden blocks – toys, board games – toys, children's books – children's products, teething rings – child-care articles. Solid examples of product types would give manufacturers an idea of how to categorize their products. What industry has gotten has been piecemeal at best. 1 example of a product is said to be a toy and the industry is left to figure out if their product is like of unlike the example given. Please provide more concrete examples of products so that the rules don't seem arbitrary or ambiguous. Please also provide the reasoning behind the choice for placing the product in that category.

D. What are the foreseeable consequences of the staff's approach?

The clear outcome of the staff's current approach is that the manufacturers are very confused and frustrated as to the disposition of their products. Since manufacturers do not have clear guidance on what product is in what category they are spending money on testing products that may not be necessary. In the worst case they may not test an item that needs to be tested.

*II. Children's Toys and Child Care Articles*

A. Should the Commission follow the exclusions listed in ASTM F963?

Yes. ASTM F963 takes a reasonable approach to identifying what items should be considered toys and leaves other standards in place to regulate items out of the scope of ASTM F963 (such as the ASTM standard for bicycles ASTM F2043)

B. Some electronic devices (such as cellular phones with incorporated games, cameras or musical devices) are decorated or marketed such that they may be attractive to children 12 years old or younger. For example, they may be decorated with cartoon characters. Should these be considered toys that are subject to the phthalate requirements under section 108? What are the characteristics that would either make these products toys or not toys?

To paraphrase Ms. Falvey commenting on what is a children's product 'just because my daughter can fit into adult shoes, does not make those shoes a children's product'. Just because cell phones and cameras have games does not make them children's products. In many cases these items are very expensive and would not reasonably be given to children to use. The primary use of a cellular phone is as a phone, it is not for the games that are found on the phone, and therefore it is not primarily of play value. Companies such as Disney® routinely sell products in adult sized apparel with cartoon representations, indicating that perhaps the fact that having a cartoon character on a shirt or phone or camera, doesn't automatically make it a children's product. Clearly characteristics that make these products non-toys are the fact that they have primary functions other than those associated with toys (i.e. a cell phone is primarily a phone). Other distinguishing characteristics are the fragility of the items. For example a Fisher-Price® camera, it is designed for the abuse that a child would reasonably inflict upon it. A Sony® Cybershot camera would not because if were handled as roughly as the Fisher-Price camera it would reasonably be expected it to break. The cost of an item is another factor to consider in differentiating toys from non-toys. In the aforementioned example of the camera, the Fisher-Price® camera costs around \$50. The Sony® camera is around \$200. It is not easy to differentiate between many products, but to imply that a cartoon character makes an item a children's product is a poor standard to pursue. At some point there needs to be a reasonable approach to making the determination of a toy. Children are fascinated with many items that are not really appropriate for them to use. Just because a child is fascinated by something does not mean that it is a toy. There is an expectation that a toy is an item that is inherently safe, something that a parent can give to a child to use without supervision (assuming they have appropriate age grading). Starting with this assumption and following with other factors such as cost, durability and primary function should be the basis for determining if any product is a toy or not.

C. Are there particular art materials, model kits, or hobby items that should be regarded as toys subject to section 108? Why or why not?

The basic premise of most art, hobby, craft and model kits is that the primary activity associated with them is the creation of a unique piece of art. While there may be some inherent play value in a craft or model in its finished stage, the finished product's primary function is to serve as a work of art. Most craft, art and models in their finished state are relatively fragile and don't have value beyond that of the artistic significance or pride in creating the project itself. ASTM D4236 has done a good job of protecting children from exposure to toxic elements in art materials. There is already a fair amount of testing that goes into arts and crafts materials, additional regulation would not be beneficial. According to the ACMI there has not been a single children's art material product has been recalled since the enactment of Labeling of Hazardous Art Materials Act (LHAMA). Art material products are already regulated under LHAMA, and this has been shown to be very effective over the years.

D. The staff proposes that tricycles are not covered by section 108, because they are excluded by ASTM F963. However, the staff has generally regarded 3- and 4-wheel ride-ons, including "Big Wheels," as toys. What distinguishes ride-on toys from tricycles?

There is little distinction between a ride-on toy and “Big Wheels” from tricycles. There isn’t any inherent danger in a “Big Wheel” that isn’t found in a tricycle. While the “Big Wheel” construction is primarily of plastic and, in general, tricycles are made from metal, the relative threat posed from materials found in a tricycle are the same as those found in a “Big Wheel”. Webster’s dictionary defines a tricycle as: “a 3-wheeled vehicle propelled by pedals or a motor”. This definition contradicts the staff’s assertion that a “Big Wheel” is different from a tricycle and would cover a “Big Wheel” as well as many 3-wheeled ATVs. The question should be has the manufacturer of the “Big Wheel” tested the product as a toy or as a tricycle. In either case the purpose of the testing is to ensure that the product is safe for use by a child. Statistics would show that more children have been harmed by *riding* a tricycle than have been harmed by any lead found in the tricycle they are riding on. The same would hold true for harm done by any phthalates in the product either.

E. Are there any other classes of products or specific products that should be excluded from the section 108 definition of toy? Why?

The danger from phthalates comes from their intake into the body. Toys that contain phthalates could provide a route of exposure if ingested, however studies have shown that the risk of phthalate exposure through dermal contact is insignificant (Toxicological Profile for DEP, U.S. Dept of Health and Human Services, June 1995). There have been dozens of documented studies that demonstrate mouthing or teething behavior is the cause for most phthalate exposure. Simply sitting on a toy or lying in close proximity to a product that contains phthalates does not increase the exposure to the levels deemed dangerous by national health organizations. Additionally mouthing behavior is relatively rare in children above age 5. It would seem appropriate that we limit the amount of phthalates in toys and child-care articles for children under the age of 5. Regulating phthalates in children’s toys for children 5 and up doesn’t make them safer, just more expensive.

F. Is the staff’s approach to distinguishing between primary and secondary child care articles technically sound? Explain.

It employs some common-sense, something that has been lacking in the regulation.

G. Does the staff’s approach focus on products for which there is the most potential for exposure to children age 3 years and under?

Plenty of studies that talk about mouthing behavior in subjects under 5. Clearly the majority of children 3 and under rely on mouthing behavior as a way to explore their world, but by age 5 nearly all children have moved on to visual, auditory and tactile sensations over mouthing behaviors. Since mouthing behavior has the highest potential for exposure, it would make sense to focus on products where this behavior is exhibited.

H. Should cribs be considered child care articles? Should the entire crib be subject to the requirements or only specific parts such as the teething rail? Why or why not?

The entire crib should not be considered a child-care article. Components like teething rails were added to these products because they preserved the product from damage. Since it is well documented that infants and toddlers (the usual occupants of cribs) utilize mouthing behaviors, and teething rails are positioned at a height where infants and toddlers would likely utilize them, it makes sense to require that the teething rails be tested for compliance to regulations. Other components like the crib base, wheels, hardware and other components are not items that an infant or toddler would likely be able to place in their mouth.

I. Are there any classes of articles or particular articles that should be excluded from the section 108 definition of child care article? Why or why not?

N/A

J. Should the following articles be regarded as subject to the requirements of section 108? Why or why not? Should they be classified as toys, child care articles, or not included?

- a. Bib
- b. Pajamas
- c. Crib or toddler mattress
- d. Mattress cover
- e. Crib sheets

- f. Infant sleep positioner
- g. Play sand
- h. Baby swing
- i. Decorated swimming goggles
- j. Water wings
- k. Shampoo bottle in animal or cartoon character
- l. Costumes and masks
- m. Baby walkers
- n. Wading pools

As explained in question "E" above, products that are typically associated with teething or sucking should be tested for phthalates in products intended for children 5 and under. In the list above only Bib and costumes are products likely to fall into this category. Crib mattresses do not provide the small surface area needed to be placed in a child's mouth. Similarly a swing, sleep positioner, baby walker and wading pool are not articles that a baby could "place in its mouth". The agency has already issued guidance that if a products can only be "licked" then that does not satisfy the criteria for being mouthable. To include Play sand seems ridiculous because you would be saying that Play sand is dangerous, but the dirt in a child's backyard may contain as much or more toxic substances. The same would be true of the water used in a wading pool, wouldn't that also need to be regulated under this interpretation? I am unaware of any public agency that routinely tests water for phthalates (the federal lead limit in water is 50ppb, although the EPA action limit is 15ppb).

K. Should all bouncers, swings, or strollers be subject to section 108 or only those advertised with a manufacturer's statement that the intended use is to facilitate sleeping, feeding, sucking, or teething? How should these be classified with respect to section 108? Toys? Child care articles? Not covered? Explain.

It is understood that it is not within the purview of the Commission to disallow the sleeping aspect of the law. Bouncers, swings and strollers realistically have minimal mouthable parts. In light of the toxicological data to the contrary, dermal transmission provides a nearly non-existent method of transfer for phthalates. The Commission would be better served in regulating products that have a potential to be placed in a child's mouth for the purpose of sucking or teething. Typical strollers, bouncers or swings do not present a reasonable hazard from phthalates.

L. Should some promotional items be regarded as toys? What are the characteristics that would make these products toys or not toys?

There isn't a reason to exempt promotional items from the regulations. There is an expectation that the item would need to exhibit the characteristics of a children's product or a toy to be regulated. It wouldn't be appropriate to regulate, for example, a pen with a company logo (a common promotional item). On the other hand the "toy" that comes with a child's meal at some fast-food establishments would certainly fall within the scope of the regulations.

M. Should playground equipment be excluded from the definition of toy? If so, what types of equipment?

As a believer in the existing standards like ASTM F1148, F1487, & F2373 playground equipment should not be regulated under the toy standard when standards already exist to cover large playground structures. The Commission should investigate making these standards mandatory like the ASTM F963 standard was for toys.

N. Should pools required to meet the standard be defined as those pools that do not require a filter and the addition of chemicals for maintenance?

N/A

O. Please comment on our phthalates test method which can be found on our Web site (add link).

N/A

**SANDLER, TRAVIS & ROSENBERG, P.A.**

ATTORNEYS AT LAW  
551 FIFTH AVENUE  
NEW YORK, NEW YORK 10176

(212) 883-1300  
FAX (212) 883-0068  
E-MAIL-ADDRESS: ghorn@strtrade.com  
WEBSITE: www.strtrade.com

GERALD B. HORN

March 23, 2009

*Via Email:* [trackinglabels@cpsc.gov](mailto:trackinglabels@cpsc.gov) and [section108definitions@cpsc.gov](mailto:section108definitions@cpsc.gov)  
Office of the Secretary  
Consumer Product Safety Commission  
Room 502  
4330 East West Highway  
Bethesda, MD 20814

**Re: Phthalates and Tracking Labels**

Dear Sirs:

This office represents Made To Fit Garment, Inc., a Canadian company in operation since 1942. Made To Fit also does business through its wholly owned U.S. subsidiary, Cantex Apparel, Inc. Made To Fit submits these comments in response to the CPSC's Requests for Comments in connection with both Sections 103 and 108 of the CPSIA.

Made To Fit has implemented a program with its manufacturers/suppliers to ensure compliance with the CPSIA and will not distribute any product anywhere that it knows is unsafe, unfit or in any other manner non-compliant or in violation of domestic laws or regulations. Made To Fit currently provides its branded children's garments to countries around the world including the United States, all of the Middle East, Russia, South and Central America, Ireland, Australia, and Malaysia to name just a few. Although its original business was as a direct manufacturer of children's clothing, Made To Fit presently contracts its proprietary brands to third party manufacturers, who ship their globally manufactured goods to Made To Fit for ultimate sale to retail customers either in combination sets or as unique stand-alone items.

## **SANDLER, TRAVIS & ROSENBERG, P.A.**

Office of the Secretary  
Consumer Product Safety Commission  
March 23, 2009  
Page -2-

### Section 103- Tracking Labels on Children's Products

If tracking labels are required on all products and packaging, identifying information such as batch numbers and production runs, Made To Fit will have no alternative but to consider the cessation of its distribution of products into the United States.

When a licensee ships its products to Made To Fit, it does so via normal "shipping" procedures and documentation requirements. It provides Made to Fit with a bill of lading number and an anticipated date of receipt. It does not provide Made To Fit with information as to production lots, batch numbers or date of manufacture. Should Made To Fit, as the private labeler, have a need to contact any particular manufacturer about any particular garment or component, it maintains its own records identifying the part with its manufacturer. Made To Fit also tracks products received via "group" identification – each such "group" referring to a particular product line or garment set. It would be nearly impossible for Made To Fit to maintain, on a garment to garment basis, all of the information described in Section 103 as being necessary to include on these labels and would be absolutely impossible to then recreate unique packaging labels combining the variety of information applicable to the variety of different garment types received, stored, commingled and later exported by Made To Fit to U.S. retail customers.

Until and unless each and every location of manufacture standardizes labeling requirements for manufactured children's garments it is impossible and cost prohibitive to require a private labeler to customize product labels and packaging labels to comply with exclusively U.S. agency requirements. Presently, a product arrives at the distribution warehouse and its arrival is entered into a computerized system tracking arrival date, garment type and shipper. When an order arrives at the warehouse, that product may be combined with 1 or 10 others in a carton or may be customized into a pre-packaged set consisting of different clothing parts, such as a hat together with a jacket or a sock together with pajama. The labels of these different articles of clothing do not identify lot numbers or production runs and the documentation accompanying the goods upon warehouse receipt similarly do not contain any of the information described in Section 103 of the CPSIA.

Which leaves Made To Fit with only several options for compliance with Section 103, each adding significantly to the cost of doing business and ultimately the product cost for U.S. consumers and none providing the desired level of assurances that the information being provided to the ultimate purchaser is accurate, comprehensive or of any measurable value.

- Made To Fit could require its product suppliers to provide it with information about production dates, lot numbers, batch runs and other information known only to the

## **SANDLER, TRAVIS & ROSENBERG, P.A.**

Office of the Secretary  
Consumer Product Safety Commission  
March 23, 2009  
Page -3-

manufacturer itself. But Made To Fit would have no means to verify this information and, once the goods are entered into the warehouse, tracking such information to particular garment or apparel set components would be nearly impossible.

- Made To Fit could require its product suppliers to affix all of this information on a permanent clothing label, which label is not required in any other country of manufacture or export. To accomplish this, Made To Fit would have to provide each of its suppliers with customized label formats and would have to pay additional costs for the extra time and labor necessary to create such an exclusive U.S. product label.
  - In certain countries and manufacturing facilities, production may not be tracked via lot numbers or batch code. Production may instead be tracked by product type, incorporated components or purchaser identification. As a result, Made To Fit would not only have to wrestle with the logistics of label format, content and application, but would also need to reassess each of its suppliers to limit its product sources to only those maintaining the exact type of records the CPSC requires be noted on such product labels. This would not only result in limited product availability and escalating consumer costs, but, of most import, would not necessarily improve the ability of ultimate purchasers to track product manufacture. A manufacturer tracking production via components or purchaser may be better equipped to identify a particular production “batch” than a supplier merely recording lot numbers (which can easily be juxtaposed) or unrecognizable batch codes.
  - Requiring a producer in a non-English speaking country to apply labels to a product as a method of complying with U.S. law is not only risky but perhaps even foolish. This is not the same as requiring a producer to affix a label indicating fiber content. 100% cotton in any language is 100% cotton. However, there is no easy translation, whether in the form of training or application, of “batch codes” or “lot numbers”, both of which may be completely alien to any known method of recordkeeping.
- Made To Fit could require its warehouse personnel to contact each of the garment manufacturers prior to customized packaging or export to a retail customer to obtain the required information in order to create customized labels for each product and

**SANDLER, TRAVIS & ROSENBERG, P.A.**

Office of the Secretary  
Consumer Product Safety Commission  
March 23, 2009  
Page -4-

then cumulative packaging labeling. The added costs for this particular option are almost too great to contemplate. Warehouse personnel would need to be much better trained and compensated, and the potential for miscommunication or misunderstanding of information passed between foreign manufacturer and Made to Fit would be immeasurable and without concomitant benefit.

Section 103 requires tracking labels to *the extent practicable* to permit manufacturer identification of production information assumedly necessary to facilitate effective product recalls and for consumers to similarly identify manufacturers or private labeler information sufficient to provide purchaser access to production data. It is imperative that CPSC do everything possible to craft regulations that are the least burdensome upon industry and which case the least amount of disruption to existing, legitimate distribution systems. It is not practical for private labelers to have to label packaging with the noted “cohort information” that is not readily available to it or that may, in fact, consist of a variety of data that would require labels larger than the packaging itself. It is not reasonable for private labelers to insist that their non-U.S. manufacturers affix product labels to garments in a form and with content disclosing proprietary trade secrets and business information that is not required to be provided in the country of manufacture or export, and, in fact, should be protectable under U.S. trade secret laws and protections. It is not practical to impose requirements upon industries that are already suffering significantly from an incredibly troubled global economy – especially when those requirements fail to standardize international practices and create the very real possibility that American consumers could be deprived of cost-effective, brand name and safe consumer goods at a time when a thriving competitive marketplace should be the universal objective of all trading partners.

So long as the ultimate purchaser can readily identify the private labeler and that private labeler is able to identify the manufacturer and the manufacturer can identify a particular production lot or batch run there is no need to require tracking labels that identify all of this distribution chain information in a readable fashion on both the products and the packaging of even combination product sets. To do so would be to intentionally create extraterritorial application of U.S. regulations in a manner solely intended to deprive U.S. consumers of cost-effective, safe, fit brand name goods that meet all requirements in terms of component chemical constituency and related limitations.

Section 108 – Phthalates

In connection with the Request for Comments on Phthalates, it is imperative that the

## **SANDLER, TRAVIS & ROSENBERG, P.A.**

Office of the Secretary  
Consumer Product Safety Commission  
March 23, 2009  
Page -5-

CPSC exclude garments from the required limitations and anticipated certification/testing requirements.

Made To Fit distributes children's pajamas, among its other catalog items. These products are admittedly used when a baby sleeps, but they do not "facilitate" sleep. "Facilitate" according to Merriam-Webster's online dictionary means to "make easier." A baby sleeps in anything it has on, or in nothing at all. Babies sleep all of the time; they do not condition sleep on what they are wearing. While a child's sleep may be facilitated by a music box or crib mobile, a rocking chair or a moving car, sleep is not at all made more or less easy because of the outfit the child happens to be wearing come night time.

The concern with phthalates must be linked with risk. Merely because a product may be used by a child during sleep time or eating time, does not mean that a child risks ingestion of some dangerous chemicals. For this reason, Made to Fit supports the CPSC staff's categorization of products into primary and secondary items, with enforcement efforts focused on primary articles only. However, it is imperative that garments not be included within primary articles since clothing cannot be considered to facilitate anything at all other than body heat or compliments to the parents on the choice of baby attire.

### **Summary Conclusion**

While the CPSC has received numerous comments noting the unintended and fatal consequences of the variety of requirements set forth in the CPSIA, Made To Fit recognizes that the Agency is limited to rulemaking and not rule-changing. However, the CPSC must enact rules that permit industry to continue providing U.S. consumers with cost-effective and safe products. Requiring detailed tracking labels on products and packaging that is not required in any other country and that consists of information proprietary to upstream product manufacturers compromises that goal. Moreover, subjecting garment manufacturers to certification and testing requirements to evidence compliance with phthalates limitations when children are at no greater risk of ingesting such chemicals whether or not wearing certain garments is nothing more than intentionally imposing burdensome business costs on an industry already struggling to meet customer needs in this incredibly scary and volatile economic environment.

Made To Fit appreciates this opportunity to comment on these regulations and sincerely appreciates the efforts made by the CPSC to reach out to industry and create productive and meaningful dialog. It is imperative that all efforts be made to protect children in each and every country of the world just as it is imperative to collaboratively meet those goals without threatening the viability of an entire industry or risking product availability to the detriment of U.S. consumers desperate to maintain a competitive domestic marketplace.

**SANDLER, TRAVIS & ROSENBERG, P.A.**

Office of the Secretary  
Consumer Product Safety Commission  
March 23, 2009  
Page -6-

Should you wish to discuss any of the foregoing comments or learn more about Made To Fit, Inc.'s operations, please feel free to contact the undersigned directly at any time.

Sincerely,

**SANDLER, TRAVIS & ROSENBERG, P.A.**

By:   
\_\_\_\_\_ Gerald B. Horn

cc: Made To Fit, Inc.  
Lauren V. Perez

**Stevenson, Todd**

---

**From:** carol@carolgracedesigns.com  
**Sent:** Tuesday, March 24, 2009 11:30 PM  
**To:** Section 108 Definitions  
**Subject:** Comments

As a small manufacturer of a baby care product made out of 97% cotton and 3% spandex fabric and 100% polyester batting, not known to contain prohibited levels of phthalates or lead, I urge you to please exempt such materials from third party testing for phthalates and lead, which would be cost prohibitive. Safety is a very important consideration, but so is the viability of businesses which support children across this nation. Please consider that adult clothing is not required to be tested and many babies spend hours in the arms of their parents, which facilitates their sleeping just as much as blankets, baby slings and other products used to soothe a baby.

In addition to the prohibitive cost of testing, there is also the onerous requirement of labeling. As a small manufacturer, production runs are very small and can often consist of only one or two of each item being made at a time. There are over a hundred different products based on various fabrics that I sew on an as-needed basis and I still haven't figured out how I am supposed to label them to meet the CPSIA requirements.

You have a lot of power over people's livelihoods and I just hope you weigh the risks associated with such products with any possible benefits from testing. As a self-employed person working out of my home, I am just one of many self-sufficient people that has been reading and educating myself on the adverse effects of the CPSIA because my livelihood does depend on it. I have written my legislators many times and have received nothing or form letters that totally miss the issues. I am depending on you to be fair minded and to save me from being unemployed, as well as enabling children to continue to be comforted by a product that has worked well for them and their parents with no risk of being exposed to lead or phthalates.

Thank you,  
Carol Logan

SHELDON MAK ROSE & ANDERSON

A PROFESSIONAL CORPORATION

ATTORNEYS

100 EAST CORSON STREET, THIRD FLOOR  
PASADENA, CALIFORNIA 91103-3842

FACSIMILE: (626) 795-6321

HOME PAGE: www.uslp.com

(626) 796-4000

OTHER CALIFORNIA OFFICES:

RIVERSIDE  
UPLAND  
VENTURA COUNTY

JEFFREY G. SHELDON  
DANTON K. MAK  
DENTON L. ANDERSON  
DAVID A. FARAH, M.D.  
DOUGLAS H. MORSEBURG  
ROBERT J. ROSE  
WILLIAM J. BRUTOCASO  
DANIEL J. COPLAN  
KRISTIN C. HIBNER, PH.D.  
MARC A. KARISH  
MICHAEL F. FEDRICK  
A. ERIC BJORGUM  
NORMAN R. VAN TREECK  
MARGARET A. CHURCHILL, PH.D.

March 24, 2009

ROBERT A. SCHROEDER  
OF COUNSEL

LES J. WEINSTEIN  
SENIOR COUNSEL

Office of the Secretary  
Consumer Product Safety Commission  
4330 East-West Highway – Room 502  
Bethesda, Maryland 20814

*Via Email ONLY*  
[Sec108definitions@cpsc.gov](mailto:Sec108definitions@cpsc.gov)

**Re: Notice of Availability of Draft Guidance Regarding Which Children’s Products are Subject to the Requirements of CPSIA Section 108. SMRA Matter No. 19255.53**

Dear Commission Staff:

We represent DEG: The Digital Entertainment Group (“DEG”). The DEG is a trade association comprised of the leading consumer electronics manufacturers, major movie studios and music companies, which include the following major entertainment companies: HBO Home Entertainment, Image Entertainment, Lionsgate Entertainment, MGM Home Entertainment, Paramount Home Entertainment, Sony Music Entertainment, Sony Pictures Home Entertainment, Summit Entertainment, Twentieth Century Fox Home Entertainment, Universal Studios Home Entertainment, Walt Disney Studios Home Entertainment and Warner Home Video; and major hardware manufacturers: D&M Holdings, JVC Company of America, LG Electronics, Meridian Audio, Microsoft, Panasonic Consumer Electronics, Philips Consumer Electronics, Pioneer Electronics, Sharp Electronics, and Toshiba America. Associate members of the DEG also include the following DVD/Blu-ray Disc/CD replicators: Arvato Digital Services, Cinram, Deluxe Digital, JVC Disc, Memory Tech, Sony DADC, and Technicolor. Accordingly, its members represent the majority of the entertainment, electronics, and disc manufacturers of home entertainment products in the United States.

On behalf of the DEG we submit the following responses to the Commission’s Request for Comments referenced above.

**SPECIFIC RESPONSES TO USCPSC’S REQUEST FOR COMMENTS**

The response set forth below reflect the concerns of the home entertainment industry as the section 108 definition of “toy” impact the members of the DEG.

**Question:** II.E. Are there any other classes of products or specific products that should be excluded from the section 108 definition of toy? Why?

SHELDON MAK ROSE & ANDERSON PC

Letter to Office of the Secretary

Consumer Product Safety Commission

March 24, 2009

Page 2

**DEG'S RESPONSE:**

Yes, Home Entertainment Discs, *i.e.*, CDs, DVDs, Blu-ray Discs, and discs that have interactive features (including their packaging), should be excluded from the section 108 definition of toy. Here is why: Section 108 of the CPSIA provides the following definition:

“Children’s Toy” is defined as a “consumer product designed or intended by the manufacturer for a child 12 years of age or younger for *use by the child when the child plays.*” [Emphasis added].

The section 108 definition should apply only to those products that have some inherent play value and constitute toys or have toy like features. Accordingly, ordinary discs intended or designed primarily for an audience of children 12 or younger are **listening, viewing, or interactive materials** lacking in any “play value.” Indeed, while a Home Entertainment Disc is being used it is not in direct contact with children. Rather it is enclosed in an electronic device which plays the disc. Hence, children do not “play” with the physical disc. This conclusion is consistent with General Counsel Advisory No. 323, *e.g.*, “[o]rdinary books, including books for small children, are generally not regarded as toys.” The rationale applied to “ordinary books,” *i.e.*, that lack inherent “play value” or “toy like” features, should also be applicable to ordinary Home Entertainment Discs to the same conclusion.

Notwithstanding the DEG’s position that discs are not toys, and therefore should not be within the section 108 definition of toy, in an abundance of caution the industry has done testing of disc products for phthalates. The test results attached hereto as Exhibit “1,” show either non-detectible levels or very low levels well within the limits established by the CPSIA, thus assuring that Home Entertainment Discs are in compliance with the CPSIA even though they should not be considered “toys.”

**CONCLUSION**

The DEG and its members are dedicated to making the safety of the public and our customers of the highest priority. Accordingly, the home entertainment industry understands the need for robust quality control to assure the safety of toys and the disc manufacturers, set forth above, submit that their proposed quality control procedures will insure the safety of Home Entertainment Discs. However, the testing laboratories’ capacity is already strained. The disc supply chain must now rely upon a basket of acceptable alternate test methods, and reasonable raw material and component manufacturer testing, as part of a comprehensive phthalate compliance verification process. Indeed, on average, the disc replicators produce four to five million discs from over a thousand different SKU’s daily. Including Home Entertainment Disc within the section 108 definition of toy will create enormous logistical difficulties for the supply chain and increase financial burdens to both the public and the industry, with no commensurate public safety benefit.

SHELDON MAK ROSE & ANDERSON PC  
Letter to Office of the Secretary  
Consumer Product Safety Commission  
March 24, 2009  
Page 3

Thank you for your consideration of the foregoing comments.

Sincerely yours,

SHELDON MAK ROSE & ANDERSON PC

By: \_\_\_\_\_  
Daniel J. Coplan

DJC/tlc

Enc.

Exhibit "1"



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 1 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name: Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

Lab Comment: ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005). GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083-04 *Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography*

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements for lead CPSIA Subsection 108(a) requirement for phthalate	600 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.
Sabic PC CD	<8	ND*	ND*	ND*	ND*	ND*	ND*
Sabic PC DVD	<8	ND*	ND*	ND*	ND*	ND*	ND*
Teijin PC DVD	<8	ND*	ND*	ND*	ND*	ND*	ND*
Bayer PC Blu-Ray Disc	<8	ND*	ND*	ND*	ND*	ND*	ND*
Sabic PC Blu-Ray Disc	<8	ND*	ND*	ND*	ND*	ND*	ND*
#300024-CAR Carthuplas Clear CD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#300254-CAR Carthuplas Black CD Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*
#300254-NEX Nexpak CD Black Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*
#300017-VIVA Viva Clear CD Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*
#301651-VIVA Viva White CD Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*

N.D. - None Detected <250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 2 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name: Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

Lab Comment: ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005). GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083-04 Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements for lead	600	1000	1000	1000	1000	1000	1000
CPSIA Subsection 108(a) requirement for phthalate	Max.						
#300259-VIVA Viva Black CD Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302890-VIVA Viva Clear CD Tray	<8	ND*	ND*	ND*	ND*	ND*	ND*
#301905-AGI AGI Black DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302034-AGI AGI White DVD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302669-AGI AGI Green DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302207-CAR Carthuplas Clear DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302516-NEX Nexpak StackPack DVD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302034-NEX Nexpak White DVD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302669-NEX Nexpak Green DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*
#303235-VIVA Viva Black DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*

N.D. – None Detected <250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-4415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 3 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name: Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

Lab Comment: ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005). GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083-04 *Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography*

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements for lead	600	1000	1000	1000	1000	1000	1000
CPSIA Subsection 108(a) requirement for phthalate	Max.						
#303234-VIVA Viva White DVD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302669-VIVA Viva Green DVD Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302306-VIVA Viva Clear Thin DVD Case	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302789-VIVA Viva Blue Blu-ray Case	<7	ND*	ND*	ND*	ND*	ND*	ND*
#301905-AGI AGI DVD Clear Cover	12	ND*	ND*	ND*	ND*	ND*	ND*
#302034-AGI AGI DVD Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302669-AGI AGI DVD Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302207-CAR Carthuplas DVD Clear Cover	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302516-NEX Nexpak StackPack Clear Cover	<8	ND*	ND*	ND*	ND*	ND*	ND*
#302034-NEX Nexpak DVD Clear Cover	<8	ND*	ND*	ND*	ND*	ND*	ND*

N.D. - None Detected <250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-4415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 4 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name: Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

Lab Comment: ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005). GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083-04 Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements for lead	600	1000	1000	1000	1000	1000	1000
CPSIA Subsection 108(a) requirement for phthalate	Max.						
#302669-NEX Nexpak DVD Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*
#303235-VIVA Viva DVD Clear Cover	<8	ND*	ND*	ND*	ND*	ND*	ND*
#303235-VIVA Viva DVD Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302669-VIVA Viva DVD Clear Cover	<6	ND*	ND*	ND*	ND*	ND*	ND*
#302306-VIVA Viva DVD Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*
#302789-VIVA Viva Blu-ray Clear Cover	<7	ND*	ND*	ND*	ND*	ND*	ND*

N.D. – None Detected <250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimens and is not to be construed as a guarantee or warranty of the condition of the entire material lot.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30063 • (770) 423-1400 Fax (770) 424-6415

Measurement uncertainty available upon request where applicable.

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 5 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name:

Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples extracted and prepared in accordance with ASTM F963-07 Paragraph 8.1- 8.3 inclusive.

Lab Comment: ICP atomic emission techniques utilized to analyze for soluble migrated element as per ASTM F963-07e1: Standard Consumer Safety Specification for Toy Safety.

### Test Results

Composition: (parts per million)

Identification	Sb	As	Ba	Cd	Cr	Pb	Hg	Se
<i>Specifications of ASTM F963-07e1</i>	60 Max.	25 Max.	1000 Max.	75 Max.	60 Max.	90 Max.	60 Max.	500 Max.
Sabic PC CD	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
Sabic PC DVD	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
Teijin PC DVD	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
Bayer PC Blu-Ray Disc	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
Sabic PC Blu-Ray Disc	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#300024-CAR Carthuplas Clear CD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#300254-CAR Carthuplas Black CD Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#300254-NEX Nexpak CD Black Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#300017-VIVA Viva Clear CD Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#301651-VIVA Viva White CD Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0

Sb-Antimony; As-Arsenic; Ba-Barium; Cd-Cadmium; Cr-Chromium; Pb-Lead; Hg-Mercury; Se-Selenium.



Prepared by:

*D.M. McKay*

D. M. McKay  
Senior Chemist

Approved by:

*P.E. Rogers*

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-4415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 6 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name:

Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples extracted and prepared in accordance with ASTM F963-07 Paragraph 8.1- 8.3 inclusive.

Lab Comment: ICP atomic emission techniques utilized to analyze for soluble migrated element as per ASTM F963-07e1: Standard Consumer Safety Specification for Toy Safety.

### Test Results

Composition: (parts per million)

Identification	Sb	As	Ba	Cd	Cr	Pb	Hg	Se
<i>Specifications of ASTM F963-07e1</i>	60 Max.	25 Max.	1000 Max.	75 Max.	60 Max.	90 Max.	60 Max.	500 Max.
#300259-VIVA Viva Black CD Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302890-VIVA Viva Clear CD Tray	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#301905-AGI AGI Black DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302034-AGI AGI White DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302669-AGI AGI Green DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302207-CAR Carthuplas Clear DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302516-NEX Nexpak StackPack DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302034-NEX Nexpak White DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302669-NEX Nexpak Green DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#303235-VIVA Viva Black DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0

Sb-Antimony; As-Arsenic; Ba-Barium; Cd-Cadmium; Cr-Chromium; Pb-Lead; Hg-Mercury; Se-Selenium.



Prepared by:

*D.M. McKay*

D. M. McKay

Senior Chemist

Approved by:

*P.E. Rogers*

P. E. Rogers

Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1480 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 7 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name: Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples extracted and prepared in accordance with ASTM F963-07 Paragraph 8.1- 8.3 inclusive.

Lab Comment: ICP atomic emission techniques utilized to analyze for soluble migrated element as per ASTM F963-07e1: Standard Consumer Safety Specification for Toy Safety.

### Test Results

Composition: (parts per million)

Identification	Sb	As	Ba	Cd	Cr	Pb	Hg	Se
<i>Specifications of ASTM F963-07e1</i>	60 Max.	25 Max.	1000 Max.	75 Max.	60 Max.	90 Max.	60 Max.	500 Max.
#303234-VIVA Viva White DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302669-VIVA Viva Green DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302306-VIVA Viva Clear Thin DVD Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302789-VIVA Viva Blue Blu-ray Case	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#301905-AGI AGI DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302034-AGI AGI DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302669-AGI AGI DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302207-CAR Carthuplas DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302516-NEX Nexpak StackPack Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302034-NEX Nexpak DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0

Sb-Antimony; As-Arsenic; Ba-Barium; Cd-Cadmium; Cr-Chromium; Pb-Lead; Hg-Mercury; Se-Selenium.



Prepared by:

*D.M. McKay*

D. M. McKay  
Senior Chemist

Approved by:

*P.E. Rogers*

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimens and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Trial Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C134536

Date January 6, 2009

Page 8 of 8

Customer: Arvato Digital Services, LLC, 108 Monticello Road, Weaverville, NC 28787

Attention: Rick Wartzok

Purchase Order #: 6029916

Part #/Name:

Various (See Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples extracted and prepared in accordance with ASTM F963-07 Paragraph 8.1- 8.3 inclusive.

Lab Comment: ICP atomic emission techniques utilized to analyze for soluble migrated element as per ASTM F963-07e1: Standard Consumer Safety Specification for Toy Safety.

### Test Results

Composition: (parts per million)

Identification	Sb	As	Ba	Cd	Cr	Pb	Hg	Se
<i>Specifications of ASTM F963-07e1</i>	60 Max.	25 Max.	1000 Max.	75 Max.	60 Max.	90 Max.	60 Max.	500 Max.
#302669-NEX Nexpak DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#303235-VIVA Viva DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#303234-VIVA Viva DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302669-VIVA Viva DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302306-VIVA Viva DVD Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0
#302789-VIVA Viva Blu-ray Clear Cover	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0	<1.0

Sb-Antimony; As-Arsenic; Ba-Barium; Cd-Cadmium; Cr-Chromium; Pb-Lead; Hg-Mercury; Se-Selenium.



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimens and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C133633 Rev. 2\*\*\*      Date December 10, 2008      Page 1 of 3

Customer: Cinram, 1275 Los Angeles Street, Glendale, CA 91204

Attention: Steve Robinson

Purchase Order #: Credit card

Part #/Name:

Various (See Test Results Table)

Material Designation: Paper and polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005).

Lab Comment: GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083 -04 Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements	600 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.
"Snapper" Paperboard Insert	<13	—	—	—	—	—	—
DVD Slipcase on Metalized Poly Board	<13	ND*	ND*	ND*	ND*	ND*	ND*
O-Card Carton on Metalized Poly Board	<10	—	—	—	—	—	—
Digi Twin Plastic Tray - Clear PS	<7	ND*	ND*	ND*	ND*	ND*	ND*
Digi Single Plastic Tray - Clear PS	<8	ND*	ND*	ND*	ND*	ND*	ND*
Amaray Insert on Metallic Paper	<30	—	—	—	—	—	—
CD Booklet on Metalized Paper	<7	—	—	—	—	—	—

\*N.D. - None Detected < 250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)

\*\*Revision to exclude those sample not tested for phthalates.

\*\*\*Revision to change sample description as per customer request.

Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager



This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C133633 Rev. 2\*\*\*      Date December 10, 2008      Page 2 of 3

Customer: Cinram, 1275 Los Angeles Street, Glendale, CA 91204

Attention: Steve Robinson

Purchase Order #: Credit card      Part #/Name: Various (See Test Results Table)

Material Designation: Paper and polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005).

Lab Comment: GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083 -04 Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
16 C.F.R. 1303 requirements	600 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.
Pressure Sensitive Stickers	<17	—	—	—	—	—	—
CD Booklet with Metallic Ink	<13	—	—	—	—	—	—
Amaray Insert on Paper with Foil Stamp	<10	—	—	—	—	—	—
Print Surface CD - Screen Print	<13	—	—	—	—	—	—
Print Surface BD 25 - Dry - Offset	8	—	—	—	—	—	—
Print Surface BD 50 - Wet	<15	ND*	ND*	ND*	ND*	ND*	ND*
Jewel Case - Clear PS	<8	ND*	ND*	ND*	ND*	ND*	ND*

\*N.D. - None Detected < 250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)

\*\*Revision to exclude those sample not tested for phthalates.

\*\*\*Revision to change sample description as per customer request.

Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager



This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.



# APPLIED TECHNICAL SERVICES, INCORPORATED

1049 Triad Court, Marietta, Georgia 30062 • (770) 423-1400 Fax (770) 424-6415

## CHEMICAL TEST REPORT

Ref. C133633 Rev. 2\*\*\* Date December 10, 2008 Page 3 of 3

Customer: Cinram, 1275 Los Angeles Street, Glendale, CA 91204

Attention: Steve Robinson

Purchase Order #: Credit card Part #/Name: Various (See Test Results Table)

Material Designation: Polymeric materials

Special Requirement: Samples prepared using microwave digestion techniques for lead analyzed.

ICP atomic emission techniques utilized to analyze for lead as per ASTM E1479-99(2005).

Lab Comment: GC/MS was used to identify and quantify the phthalate compounds according to ASTM D 7083 -04 *Standard Practice for Determination of Monomeric Plasticizers in Poly (Vinyl Chloride) (PVC) by Gas Chromatography*

### Test Results

Composition: (parts per million)

Identification	Pb	DnBP	BBP	DEHP	DnOP	DINP	DIDP
<i>16 C.F.R. 1303 requirements</i>	600 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.	1000 Max.
Amaray Case #1 - Clear PP	<9	ND*	ND*	ND*	ND*	ND*	ND*
Amaray Case #1 - Black PP	<7	ND*	ND*	ND*	ND*	ND*	ND*
Amaray Case #2 - Clear PP	<8	ND*	ND*	ND*	ND*	ND*	ND*
Amaray Case #2 - Black PP	<7	ND*	ND*	ND*	ND*	ND*	ND*

\*N.D. - None Detected < 250 ppm: Di-n-Butyl Phthalate (DnBP), Butyl Benzyl Phthalate (BBP), Di-Ethyl Hexyl Phthalate (DEHP), Di-n-Octyl Phthalate (DnOP), Di-Isononyl Phthalate (DINP) and Di Isodecyl Phthalate (DIDP)

\*\*Revision to exclude those sample not tested for phthalates.

\*\*\*Revision to change sample description as per customer request.



Prepared by:

D. M. McKay  
Senior Chemist

Approved by:

P. E. Rogers  
Manager

This report may not be reproduced except in full. This report represents interpretation of the results obtained from the test specimen and is not to be construed as a guaranty or warranty of the condition of the entire material lot. Measurement uncertainty available upon request where applicable.

**Stevenson, Todd**

---

**From:** Daniel Coplan [daniel.coplan@smralaw.com]  
**Sent:** Tuesday, March 24, 2009 7:20 PM  
**To:** Section 108 Definitions  
**Cc:** Trina Chamberlain  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108  
**Attachments:** Sec 108 Def Letter to CPSC 3-24-09.pdf

**Re: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108 SMRA Matter No. 19255.53**

Dear Commission Staff:

We represent DEG: The Digital Entertainment Group ("DEG").

On behalf of the DEG we submit the attached PDF which contains the DEG's responses, and Exhibits thereo, to the Commission's Request for Comments referenced above.

If you have any questions or comments, or need additional information please feel free to contact us. Please confirm your receipt of this email and the attachment.

Thank you for your consideration of the attached comments.

Sincerely yours,  
Sheldon Mak Rose & Anderson PC

Daniel J. Coplan

**Sheldon Mak  
Rose & Anderson**  
INTELLECTUAL PROPERTY LAW

Sheldon Mak Rose & Anderson PC  
100 E. Corson Street  
Third Floor  
Pasadena, CA 91103-3842  
626-796-4000 Fax 626-795-6321

[daniel.coplan@usip.com](mailto:daniel.coplan@usip.com)

This transmission is intended only for the use of the addressee and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately via email at [daniel.coplan@usip.com](mailto:daniel.coplan@usip.com) or by telephone at (626) 796-4000. Thank you.

**Stevenson, Todd**

---

**From:** Caroline Cox [caroline@ceh.org]  
**Sent:** Tuesday, March 24, 2009 4:38 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108

Office of the Secretary  
Consumer Product Safety Commission,  
4330 East West Highway  
Bethesda, Maryland 20814

Dear Commissioners:

The Center for Environmental Health is pleased to provide this response to the draft guidance regarding which children's products are subject to the requirements of CPSIA Section 108. Our responses to your questions follow.

Question IA: Provide comments on staff's approach to determining which products are subject to the requirements of CPSIA section 108. Explain.

CEH response: Our goal is, and the goal of CPSC's approach should be, to protect children to the maximum extent possible under the statute.

Question IAa: Does it result in clear guidance? Why?

CEH response: The division of "child care articles" into primary and secondary products is ambiguous and subjective. We also believe that the exemption of items just because they are excluded by ASTM F963 is not consistent with the intent of the law.

Question IAb: Do you have suggested changes to the approach? Why?

CEH response: We believe that the CPSC should interpret the law broadly and include as many products as possible in the definitions. This will reduce, as much as possible, the exposure of children to phthalates, as we believe the law intended.

Question IB: Is there an alternative approach that should be used? Please describe.

CEH response: See response to A.b. above.

Question IC: Is there any additional guidance on products that are subject to section 108 that would be useful to manufacturers? Describe.

CEH response: CPSC should provide guidance to manufacturers that a broad interpretation of the law is the one that will provide maximum protections to children.

Question ID: What are the foreseeable consequences of the staff's approach?

CEH response: The staff's approach could delay the actual implementation of the law by encouraging lengthy discussions and legal action regarding what specific products can be exempted from the law.

Question IIA. Should the Commission follow the exclusions listed in ASTM F963?

CEH response: We are concerned about the exclusion of three categories listed in ASTM F963: bicycles, tricycles, and art materials. In these cases, if the item is clearly something that fits the statutory definitions in the CPSIA then the items should not be excluded just because of their exclusion from ASTM F963.

Question IIB. Some electronic devices (such as cellular phones with incorporated games, cameras or musical devices) are decorated or marketed such that they may be attractive to children 12 years old or younger. For example, they may be decorated with cartoon characters. Should these be considered toys that are subject to the phthalate requirements under section 108? What are the characteristics that would either make these products toys or not toys?

CEH response: If they are designed for children's play as opposed to more adult uses, or are marketed to children, then the devices should be identified as toys. Phones that contain games (even if they can also be used as cell phones), musical devices that are marketed for entertainment rather than for serious music are examples of electronic devices that should be considered toys.

Question IIC. Are there particular art materials, model kits, or hobby items that should be regarded as toys subject to section 108? Why or why not?

CEH response: Art materials that are marketed for children's play should be regarded as toys. Examples include polymer clays, crayons and marker sets specifically marketed for children, and kits for children to make items like keychains, jewelry, hair accessories, or clothes ornaments.

Question IID. The staff proposes that tricycles are not covered by section 108, because they are excluded by ASTM F963. However, the staff has generally regarded 3- and 4-wheel ride-ons, including "Big Wheels," as toys. What distinguishes ride-on toys from tricycles?

CEH response: We believe that both tricycles and "ride-ons" should be included in the scope of Section 108. The parts of these products that should meet the phthalate requirements of the CPSIA are the parts that children will frequently contact.

Question IIE. Are there any other classes of products or specific products that should be excluded from the section 108 definition of toy? Why?

CEH response: As stated above, we believe that the CPSC should be inclusive in its interpretation of Section 108 so that children are maximally protected.

Question IIF. Is the staff's approach to distinguishing between primary and secondary child care articles technically sound? Explain.

CEH response: We believe that the CPSC should not exempt items which can directly expose a baby or young child to phthalates just because their primary user is an adult. Examples include bouncers, swings, strollers (whether or not they recline), breast pumps, and nursing shields.

Question IIG. Does the staff's approach focus on products for which there is the most potential for exposure to children age 3 years and under?

CEH response: We believe that the staff's approach with crib and toddler mattresses and mattress pads misses products which potentially expose children to phthalates. We understand that an argument can be made that these products are not in direct contact with children because they are covered with a sheet. However, we have not seen any data that shows that phthalates cannot migrate through fabrics like those used in sheets. In addition, there is a body of research suggesting that dust is a primary route of exposure to phthalates. This exposure pathway is relevant whether or not a mattress or mattress pad is covered with a sheet.

Question IIH. Should cribs be considered child care articles? Should the entire crib be subject to the requirements or only specific parts such as the teething rail? Why or why not?

CEH response: Because of the issues with dust exposure mentioned above, we believe that the entire crib should be considered a child care article.

Question III. Are there any classes of articles or particular articles that should be excluded from the section 108 definition of child care article? Why or why not?

CEH response: We support an inclusive interpretation of section 108 with as much protection for children as possible.

Question II J. Should the following articles be regarded as subject to the requirements of section 108? Why or why not? Should they be classified as toys, child care articles, or not included?

CEH responses:

- a. Bibs should be classified as child care articles because of the potential for mouthing.
- b. Pajamas should be classified as child care articles because of the potential for mouthing.
- c. Crib or toddler mattress should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.
- d. Mattress cover should be classified as child care articles because of the potential for mouthing and the potential for contamination

of dust.

e. Crib sheets should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.

f. Infant sleep positioner should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.

g. Play sand should be classified as a toy because of the potential for mouthing and ingestion.

h. Baby swing should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.

i. Decorated swimming goggles should be classified as a toy because of the potential for mouthing.

j. Water wings should be classified as a toy because of the potential for mouthing.

k. Shampoo bottle in animal or cartoon character should be classified as a toy because of the potential for mouthing.

l. Costumes and masks should be classified as a toy because of the potential for mouthing.

m. Baby walkers should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.

n. Wading pools should be classified as a toy because of the potential for mouthing.

Question IIK. Should all bouncers, swings, or strollers be subject to section 108 or only those advertised with a manufacturer's statement that the intended use is to facilitate sleeping, feeding, sucking, or teething? How should these be classified with respect to section 108? Toys? Child care articles? Not covered? Explain.

CEH response: We believe that these articles should be classified as child care articles because of the potential for mouthing and the potential for contamination of dust.

Question IIL. Should some promotional items be regarded as toys? What are the characteristics that would make these products toys or not toys?

CEH response: If children play with them, or if they are marketed to children, they should be regarded as toys.

Question IIM. Should playground equipment be excluded from the definition of toy? If so, what types of equipment?

CEH response: Parts of the playground equipment that can be mouthed or touched by children should be considered toys.

Question IIN. Should pools required to meet the standard be defined as those pools that do not require a filter and the addition of chemicals for maintenance?

CEH response: We believe that all pools used by children should meet the standard.

Question IIO. Please comment on our phthalates test method which can be found on our Web site (add link).

CEH response: The test method composites all of the components in a toy for phthalate analysis. These means that a component with a high phthalate concentration is acceptable as long as enough of the rest of the toy contains no more than low phthalate concentrations. This is not acceptable when the high-phthalate concentration component is the part of the toy that has high exposure potential (the part that a child would be likely to mouth, for example.)

Thank you for the opportunity to provide comments on this important guidance.

Sincerely,

Caroline Cox  
research director  
Center for Environmental Health  
2201 Broadway, Suite 302  
Oakland CA 94612  
caroline@ceh.org



founded 1881

March 24, 2009

Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

**Submitted via Email to [section108definitions@cpsc.gov](mailto:section108definitions@cpsc.gov)**

*Re: "Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108"*

Dear Sir or Madam:

The Consumer Healthcare Products Association (CHPA) appreciates the opportunity to provide comments on the "Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108." Founded in 1881, CHPA is a national trade association representing leading manufacturers of over-the-counter, non prescription medicines and dietary supplements.

In its request for comment, the Consumer Product Safety Commission (CPSC) solicits written comments on the Commission's general approach to determining which products are subject to the requirements of the Consumer Product Safety Improvement Act (CPSIA) section 108 related to the sale of products containing specified phthalates. As noted in the request for comment, the requirements of section 108 apply to subsets of "consumer products" as defined by the Consumer Product Safety Act (CPSA). *See* CPSA, P.L. 92-573, § 3(a)(5). As further noted in the CPSC's request, certain products, including foods and drugs, are excluded from the definition of "consumer products." *See* CPSA, P.L. 92-573, § 3(a)(5)(H), (I).

CHPA supports the CPSC's recognition of the statutory exclusion of food and drug products from the definition of "consumer products." While other more general sections of the CPSIA not restricted to "consumer products" may be applicable to medicines and dietary supplements or their packaging, provisions of the law limited to "consumer products," such as section 108 of the CPSIA, clearly do not apply to these product categories.

More broadly, many provisions of the CPSIA apply only to "children's products" (e.g., third party testing requirements). "Children's products" are specifically defined as a subset of "consumer products." CPSA, P.L. 92-573, § 3(a)(2). As referenced above, foods and drugs are expressly exempted from the definition of "consumer products," and therefore CPSIA requirements related to "children's products" also do not apply to pediatric drugs and dietary supplements.

Consumer Healthcare  
Products Association  
900 19<sup>th</sup> Street, NW, Suite 700  
Washington, DC 20006  
T 202.429.9260 F 202.223.6835  
[www.chpa-info.org](http://www.chpa-info.org)

We stated this position in CHPA's October 29, 2008 letter to CPSC regarding CPSIA section 102 certificate requirements and believe that a Frequently Asked Questions (FAQ) document posted by CPSC on December 10, 2008 confirms CPSC's support for our position (<http://www.cpsc.gov/about/cpsia/faq/102faq.html#102q10>). CPSC's FAQ document explicitly states that "CPSC does not regulate children's drugs and their accompanying dosing devices such as dosing cups or separate dosing droppers. These products are excluded from the definition of "consumer product" under the Consumer Product Safety Act."

CHPA supports the Commission's ongoing efforts to provide guidance with an opportunity for public comment on issues related to the CPSIA. CHPA members thank the CPSC for the opportunity to provide our comments on this important issue. If the Commission has any questions or if CHPA can be of any assistance, please let us know.

Kind regards,

A handwritten signature in black ink, appearing to read "Andrew C. Fish". The signature is written in a cursive, flowing style.

Andrew C. Fish  
Senior Vice President, Legal and Government Affairs

**Stevenson, Todd**

---

**From:** Manhoff, Alison [AManhoff@chpa-info.org]  
**Sent:** Tuesday, March 24, 2009 3:42 PM  
**To:** Section 108 Definitions  
**Cc:** Fish, Andrew  
**Subject:** Comments Regarding "Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108"  
**Attachments:** CHPA comments on CPSIA Section 108- 3\_24\_09.pdf

Attached please find the Consumer Healthcare Products Association's comments on the Consumer Product Safety Commission's "Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108."

On behalf of our members, we thank the Commission for the opportunity to provide comments.

Kind regards,

Alison Manhoff

Alison M. Manhoff  
Associate General Counsel  
Consumer Healthcare Products Association  
900 19th Street, NW, Suite 700  
Washington, DC 20006  
Tel: 202.429.3525  
Fax: 866.394.3690  
[amanhoff@chpa-info.org](mailto:amanhoff@chpa-info.org)

**TOMPKINS & DAVIDSON, LLP**  
**COUNSELORS AT LAW**

Five Hanover Square  
15<sup>th</sup> Floor  
New York, NY 10004

phone – 212 944 6611  
fax – 212 944 9779  
e-mail – [tdlaw@tdllp.com](mailto:tdlaw@tdllp.com)

March 24, 2009

Via e-mail  
Todd A. Stevenson, Secretary  
Office of the Secretary  
Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

**RE: Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108: Comments on Coverage –Packaging Should Be Exempt**

Dear Mr. Stevenson:

The following comments submitted with respect to Section 108 of the Consumer Product Safety Improvement Act of 2008 concern the question raised by Commission staff in the Federal Register notice of February 23, 2009 as to whether there are classes of products or specific products that should be excluded from the section 108 definition of toys. We thank you for the opportunity to express comments on the Commission staff proposals.

Section 108 of the Consumer Product Safety Improvement Act (“CPSIA”) permanently prohibits the sale of any “children's toy or child care article” that containing more than 0.1 percent of three specified phthalates, di-(2-ethylhexyl)phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP). Section 108 also prohibits on an interim basis “toys that can be placed in a child's mouth” or “child care articles” containing more than 0.1 percent of three additional phthalates, diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP). Section 108 of CPSIA contains definitions of the terms “children's

toy,” “toy that can be placed in a child's mouth,” and “child care article”, which definitions apply only with respect to enforcement of the Section 108 phthalates ban.

The Federal Register notice of February 23<sup>rd</sup> indicates that there have been many inquiries from manufacturers seeking clarification on which products are subject to the requirements of Section 108. The notice details the staff approach to determining whether particular products, which may fall within the ban’s coverage of toys, toys that can be placed in a child’s mouth” and “child care articles”.

Although the notice questions the applicability of the ban to various articles, and classes of articles, for children, it does not discuss the packaging of such products, which we believe requires review, in light of the following FAQ published by the Commission as a response to a question concerning the application of Section 108 to packaging. The question and response read as follows:

***Does the packaging of a product have to comply with the phthalates ban? Does it matter if the packaging is normally discarded (e.g. poly bag and blister packaging) or intended to be reused (e.g., heavy gauge reusable bag with zipper closure to store a set of blocks)?***

The CPSIA defines children’s toys as consumer products designed or intended for use by children 12 and under when playing. Packaging is generally not intended for use by children when they play, given that most packaging is discarded and is not used or played with as a children’s toy or child care article. However, if the packaging is intended to be reused, or used in conjunction with a child care article or with a children’s toy while playing, such as a heavy gauge reusable bag used to hold blocks, it would be subject to the phthalates ban.

We submit that the response declaring that the involved packaging (apparently a storage container for blocks) will be subject to the phthalates ban is not in accord with the definitions of “children’s toys” applicable under Section 108. With respect to toys, Section 108 of the CPSIA defines a “children's toy” as a “consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.” The staff approach set forth in the Federal Register notice for determining whether a particular product is designed or intended for use by a child 12 years of age or younger during play (our emphasis) will be made following factors:

- A. Whether the intended use of the product is for play, including a label on the product if such statement is reasonable.
- B. Whether the product is represented in its packaging, display, promotion or advertising as appropriate for use by the ages specified.
- C. Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.
- D. The *Age Determination Guidelines* issued by the Commission staff in September 2002, and any successor to such guidelines.

*The Age Determination Guidelines* posits seven main categories that apply to the various play behaviors in which children engage and how they use toys during play: Early Exploratory/Practice Play, Construction Play, Pretend & Role Play, Game & Activity Play, Sports & Recreational Play, Media Play, and Educational & Academic Play. The *Guidelines* list fourteen characteristics of toys that have the potential to appeal to toy consumers, including: size, shape, number of parts, interlocking versus loose parts, materials, motor skills required, color/contrast, cause and effect, sensory elements, level of realism/detail, licensing, classic, robotic/smart features, and educational.

A block bag, and toy packaging in general, lack the *Guideline* characteristics that create play appeal, which alone should serve as a disqualification from the coverage of Section 108.

The Commission staff response in the FAQ serves to establish two alternative bases under which the packaging at issue will be subject to the phthalates ban. The second stated basis for application of the ban, that a bag sold with toy blocks that is intended to be used in conjunction with a child's toy while the child is playing, arguably references the statutory requirement that the use of the packaging holding toys will involve removing and replacing the blocks in the bag in preparation for playing with the blocks, although the intended use may well be simply as a storage facility when the blocks are not being used for play, something that might have been established through the advertising inserts or pictures likely found on the bag at the time of sale, in which case reference to the four factor analysis may well have become necessary. Nevertheless, it is not appropriate, under the Section 108 definition for "toys", for the possible blanket determination that packaging capable of re-use becomes subject to the phthalates ban, without reference to whether the packaging is sold with toys or child care articles and is intended for use with the toys during play or for use as a child care article.

It appears that the response may have applied strictly to toy packaging, or that the references to playing were intended to modify both "intended for re-use", and "intended for use ... while the child plays." We ask that this be made clear through an amendment of the FAQ, and that the Commission confirm that packaging is exempt from the phthalates ban, unless the

Todd A. Stevenson, Secretary  
Consumer Products Safety Commission  
March 24, 2009  
Page 5 of 5

packaging either falls within the “toy” definition because it is sold with toys and designed or intended to be reused while the child is playing, or, in the case of packaging holding a child care article, the packaging is used by the child to render it a “primary” article under the Commissions’ proposed methodology for distinguishing between “child care” products. Otherwise, the FAQ response creates uncertainty as to whether the Commission may inadvertently establish an additional, unanticipated class of product, without limit even to packaging for children’s products, which we submit is clearly not the intent of the coverage of the phthalates ban under the definitions for toys and child care articles in Section 108 of the CPSIA.

The phthalates ban should not apply to reusable packaging, unless the packaging is subjected to the guidelines used for products.

Thank you for your consideration.

Sincerely,

**TOMPKINS & DAVIDSON, LLP**

*Robert T. Stack* (e-signature)

Robert T. Stack, Esq.

**Stevenson, Todd**

---

**From:** Robert Stack [rstack@tdllp.com]  
**Sent:** Tuesday, March 24, 2009 3:57 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108  
**Attachments:** e of Availability of Draft Guidance Regarding Which Children's Products Are Subject to the Requirements of CPSIA Section 108.pdf

Dear Mr. Stevenson:

Please see attached comments on packaging and Section 108.

Sincerely,

Robert T. Stack, Esq,

TOMPKINS & DAVIDSON, LLP  
5 Hanover Square, 15th Floor  
New York, NY 10004  
PH: (212)-944-6611, ext. 130  
FAX: (212)-944-9779

The contents of this message may be privileged, under the attorney - client privilege or under the attorney work product rule. Intended recipients should keep this message in a separate folder with other privileged communications relating to the same matter. If you have received this message in error and are not an intended addressee, please delete your copy of this message and notify the sender of this. Thank you

**Stevenson, Todd**

---

**From:** Steve Berger [SBerger@craftandhobby.org]  
**Sent:** Tuesday, March 24, 2009 3:00 PM  
**To:** Section 108 Definitions  
**Cc:** Steve Berger; Jon R. Krance  
**Subject:** CHA Comments on the Inapplicability of Section 108's Phthalate Requirements



319 East 54th Street  
 Elmwood Park, NJ 07407 USA  
 201 835-1200  
 Fax 201 797-0657  
[www.craftandhobby.org](http://www.craftandhobby.org)  
[www.chashow.org](http://www.chashow.org)

March 24, 2009

Office of the Secretary  
 U.S. Consumer Product Safety Commission  
 4330 East West Highway  
 Bethesda, Maryland 20814  
[section108definitions@cpsc.gov](mailto:section108definitions@cpsc.gov)

**CHA Comments on the Inapplicability of Section 108's Phthalate Requirements  
 For Certain Toys and Child Care Articles to Craft and Hobby products**

In response to the request of the Commission's staff, the Craft & Hobby Association Inc. ("CHA" or the "Association") submits the following comments on Section 108 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA" or the "Act"), which prohibits the sale of certain narrowly defined "toy" and "childcare" products containing specified phthalates. CHA hopes that these comments will assist the Commission in effectively developing regulations governing the use of phthalates in certain children's products in the United States. Since these regulations, if not crafted to explicitly excluded craft products not designed or intended *primarily* for children twelve years of age and younger could significantly impact our member's products, these issues are extremely important to CHA's 4000 member companies, representing twenty nine (29) Billion Dollars at Retail Value. The purpose of these comments is to provide our initial views on which products should or shouldn't be subject to the requirements of section 108 of the CPSIA. We will also address approaches that could be applied to particular product classes. CHA reserves the right to supplement or amend its comments as appropriate.

Section 108 of CPSIA permanently prohibits the sale of any further defined "children's toy or child care article" containing more than 0.1 percent of three specified phthalates, Di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), and benzyl butyl phthalate (BBP) and also prohibits on an interim basis "toys that can be placed in a child's mouth" containing more than 0.1 percent of three additional phthalates, Diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP). These prohibitions became effective on February 10, 2009. The terms "children's toy," "toy that can be placed in a child's mouth," and "child care article" are defined terms in section 108, and the definitions apply only to this section of the Act. However the language of other provisions of the Act has a direct bearing on how the terms may be interpreted. In addition the genesis of the adopted phthalates restrictions should be considered since they have a direct bearing the potential risks, or the lack thereof, and the nature of implementing regulations that should reasonably be developed. The CPSC in requesting comment has provided illustrations of the staff's approach to establishing a framework for evaluating products subject to restriction, but have recognized that conclusions that are generally true for a class of products may not necessarily apply to each specific product in that class. Also given the statutory language, the manufacturers stated intent and the manner in which a product is advertised; marketed and promoted has a significant impact on whether or not the

product falls within or outside the scope of standard. The requirements of section 108 apply to subsets of “consumer products” as defined by the Consumer Product Safety Act (CPSA). Similarly the requirements may also be considered as a further subset of “children’s products” as defined more generally as a broader class under the Act. Complicating matters even further some products may fall under the jurisdiction of other agencies

The CPSC staff has requested comments on staff’s approach to determining which products are subject to the requirements of CPSIA section 108, whether the limited guidance provided thus far has been clear, whether modifications are warranted and whether alternative approaches should be employed.

### **Applicability of Statutory Requirements**

As we’ve noted a “children’s toy” is defined as “a consumer product designed or intended by the manufacturer primarily for a child 12 years of age or younger *for use by the child when the child plays.*” § 108(e) (1) (B) (emphasis added). This definition amounts to the definition of “children’s product” in Section 235(a) plus the italicized phrase. A “child care article” is defined as “a consumer product designed or intended by the manufacturer to *facilitate* sleep or the feeding of children age 3 and younger, or to help such children with sucking and teething.” § 108(e) (1) (C) (emphasis added).

The second group of regulated phthalates consists of those known as DINP, DIDP, and DnOP. This restriction is interim, pending the creation and report of a Chronic Hazard Advisory Panel pursuant to § 108(b) (2) & (3). The applicable definitions of “children’s toy” and “child care article” are the same as for the first group, but the restriction regarding a children’s toy is expressly limited to a toy “that can be placed in a child’s mouth.” Section 108(e) (2) (B) defines this concept. Clearly most craft and hobby items are not intended by their manufacturer as primarily for children 12 years of age or younger for use as a defined toy. Also clearly such items are wholly unrelated to the child care articles as defined and regulated activities (sleep, feeding, teething or sucking) directly related to their use.

### **Mere Use of a Product that Contains Such Phthalates Does Not Result In Serious Health Risks for Children from the Specified Phthalates.**

There are several reasons that the Commission, at least in applying Section 108(b)’s interim prohibitions on DINP, DIDP, and DnOP, should be consistent with the statutory text and explicitly consider the potential for exposure of a child to phthalates from a toy. The Chronic Hazard Advisory Panel mandated by Section 108(b)(2), whose report will play a large role in determining the future of these interim prohibitions, must consider “the likely level of . . . exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of” products for children. § 108(b) (2) (B). It also must consider “the cumulative effect of total exposure to phthalates.” *Id.* And it specifically must consider “ingestion,” “dermal,” and “hand-to-mouth” exposure, as well as any “other exposure.” *Id.* Finally, the Panel is to take into account “uncertainties regarding exposure.” *Id.*

Second, the statutory definitions of “children’s toy” and “child care article” reinforce this overarching concern of Section 108 with exposure. A “children’s toy” is a product designed or intended for “*use by the child*” when the child plays. “Use” indicates contact, which is a potential source of exposure. The definition of “child care article” is even narrower. It does not extend to all use of the product by a child three years or younger; rather, such use must directly facilitate sleep, feeding, sucking, or teething. A product to “help” a child “with sucking or teething” will be one on which a child sucks or teethes—creating a particular risk of exposure. A plain reading indicates that the activities referenced involving mouthing behavior is a key concern which is why the CPSC has historically focused on exposure risks from products reasonably intended to be mouthed such as teethers, rattles, and pacifiers. Similarly, the statutory reference to a product designed or intended “to facilitate sleep or the feeding of” a young child (including a pacifier) is most reasonably understood as one that the child will use for that purpose, meaning that he will come into contact with it. The requirement that the product actually “facilitate” the activity indicates a narrower requirement than “use” of the product. Obviously a plain reading of the language indicates that Congress intended a direct relationship between the use of the product; with the direct consequence required being sleep, feeding, or aid in sucking and teething. This requires more than mere “use” of the product. This is why use alone is an insufficient basis for subjecting a child care product to these requirements.

The definition of mouthing, and Section 108(b) (1)'s express limitation of the regulation of three phthalates in children's toys to those that are capable of being mouthed, also reinforce this point. This definition contrasts a toy that "can be sucked and chewed" with one that can only "be licked." In making this distinction, Congress recognized that although licking may cause exposure, only the significant exposure created by chewing and sucking material inserted into a child's mouth presented a potential hazard. As regards the interim-banned phthalates, Congress (consistent with the European Union) sought to focus on this primary risk of exposure. Exposure risk of children remains the touchstone in assessing product restrictions. The European Union's phthalate regulations reinforce this point when noting that "the exposure of children to all practically avoidable sources of emissions of phthalates, *especially from articles which are put into the mouth by children*, should be reduced as far as possible." (Directive 2005/84/EC, preamble). The EU's Directive, similarly draws a distinction between DEHP, DBP, and BBP, on the one hand, and DINP, DIDP, and DNoP, on the other. Likewise, CPSC's own extensive study in 2003 also emphasized that, "because plasticizers are not tightly bound to PVC, they may be released *when children place PVC products in their mouths*," and even then children are not likely to face any serious health risk (See Commission's denial in February 2003 of a petition to ban PVC containing DINP in children's products with extensive annexed studies).

Therefore, text, legislative precedent, and policy all indicate that a toy should, in the context of its usage in Section 108(b) (2), be read as explicitly and implicitly requiring mouthing of a product. That is why, as noted, the Commission has traditionally focused on use of phthalates in teething rings, rattles, and pacifiers and the recently announced CPSC enforcement policy also does. This is also why, as noted, the EU approach is especially concerned with "articles that are put into the mouth by children."

Further support for this approach is found in the phrase "contains concentrations" in Section 108 is undefined and allows for interpretation in light of Section 108's overall concern with children's exposure to phthalates. For example, given that the grammatical subject of this phrase is "toy" or "article" in Section 108(b) (1), as well as Section 108(a), rather than "part" or "component part" (terms not directly mentioned), it can be contended that whether a product has an impermissible concentration of any of the six specified phthalates is determined on the basis of the whole product. Indeed this is reflected in the recently published CPSC test protocol. Such protocol reflects the fact that the whole-product assessment is required (p.4). We note that should any changes to this protocol result as a result of this comment process that it is essential that any such changes be made only upon notice with opportunity to comment and pursuant to the due process requirements of the Administrative Procedure Act ("APA") and with adequate advanced notice prior to any changes. Many manufacturers of product are currently relying on this protocol. Otherwise the disruption to production, testing and availability of product could be negatively and significantly impacted. There is no reason for the Commission to run such risks by reading Section 108 to require more than it actually does. As the CPSC staff considers comments, it should consider limiting the phthalate restriction only to accessible parts to reduce unnecessary testing and expense. If done this should be consistent with the EU approach of testing only such accessible, mouthable parts.

### **Craft and Hobby Products Are Generally Not Primarily Children's Toys**

The U.S. Consumer Product Safety Commission (CPSC) staff has previously addressed a number of questions concerning applicability of phthalate limits and recently issued [guidance in draft form](#) (pdf) for public comment on what may or may not constitute defined toys and childcare articles. Although the guidance was intended to help manufacturers, importers, retailers and consumers determine what products are covered by the phthalate limits, the guidance documents issued thus far do not provide the definitive determinations necessary for manufacturers, importers, distributors and retailers to adequately discern which products are clearly within the scope of the requirements and, more importantly, which are not. Even if a product category may reasonably be subject to Section 108 restrictions, it also does not necessarily follow that all materials from which the regulated product is made should be required to be tested for the regulated phthalates, since certain materials do not inherently contain such phthalates in their formulation.

We have noted and fully support the decision by the CPSC staff, in the discretion afforded it, to focus its resources only on enforcement efforts directed at products, already noted as most likely to pose a risk of phthalate exposure to children. Specifically, we believe such products traditionally encompass polyvinyl chloride (“pvc”) bath toys and other small, pvc toys that are designed and reasonably intended by the manufacturer for young children and that can be put in the mouth, chewed or sucked, such as rattles, teethingers and pacifiers, but not other toy products and certainly not most craft materials.

Section 108 of the CPSIA defines a “*children’s toy*” as a “*consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.*” [CPSIA §108(e) (1) (C)]. Any determination as to whether a particular product is designed or intended for use by a child 12 years of age or younger during play will be made after consideration of the following factors:

- Whether the intended use of the product is for play, including a label on the product if such statement is reasonable.*
- whether the product is represented in its packaging, display, promotion or advertising as appropriate for use by the ages specified.*
- Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.*
- The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.*

In addition, consideration of the definition of “toy” in the ASTM F963-07 toy safety standard for guidance as to which products should be considered toys and which should not should apply. The CPSIA makes ASTM F963 a mandatory CPSC standard on February 10, 2009. ASTM F963 excludes certain types of articles from the definition including: Art materials; model kits and hobby items in which the finished products is not primarily of play value. Congress expressly adopted the full terms of such Standard, including exclusionary terms, expressly by under CPSIA Section 106. The fact that Congress eliminated adoption of the flammability Annex to such standard, demonstrates that had Congress intended that the listed exclusions for the above listed product categories, it would have similarly acted to strike adoptions of such provisions. The fact that it did not, reasonably indicates that it intended that such exclusions should apply as part of the regulatory definition of which products are considered within (or outside) the scope of defined toy products.

We believe that such distinctions are valid as far as they go, but that additional criteria are required to be considered. Therefore, we also urge the CPSC staff consider the manufacturers stated intent and “Functional” performance of the product as an essential dividing criterion between children’s version of such products and “toy” versions that simulates adult activity.

We note that Art and Craft materials specifically are excluded by ASTM F963 Standard Consumer Safety Specification for Toy Safety. Some of these products are also subject to the requirements of the Labeling of Hazardous Art Materials Act (LHAMA), which applies to a broad range of chronic hazards and requires the product formulation to be reviewed by a qualified toxicologist and indicates they should be excluded from consideration as a defined toy. We also note that ordinary instructional literature on “How To ...” knit, sew, construct and undertake a variety of home projects and ordinary books, including books for small children, are generally not regarded as toys. Such products are distinct from books that may also incorporate and function as games or toy activities under both ASTM F963 and CPSIA section 108.

Additional craft items as follows are not recognized as material that are designed or intended *primarily* for children 12 and younger as a toy:

- Art Supply Products including but not limited to airbrush supplies, brushes, paints, inks, varnishes, canvases, easels, pencils, pens, markers, sketch pads, paper, etc
- craft beads, links, jewelry making clasps, chains, metals, wood, ceramic, semi precious and precious gemstones, etc.

-Floral Supplies, tools, stems, containers, adhesives, dried floral material, foam board, ceramic, metal or wood containers, etc.

-General craft supplies, adhesives, glues, textiles, clays, tapes, foam, candle wax, soaps, leathers, leather crafting tools, ribbon, etc

-Framing Kits, wood, fasteners, paper boarder stock, mounting wire, picture hooks, picture eyelets, etc.

-Yarn and needle crafts, crochet and knitting needles/hooks, yarns, threads, strings and cords, trim, cutting tools, pattern books, etc.

-Paper Crafts, cutting tools, stencils, templates, paper stock, trimmers, tapes, adhesives, glues, pens markets, inks, print pads, dies and stamps, invitations, etc.

-Decorative Crafts, baskets, frames, glassware, shells, textile trim, paint applicators, etc.

For all of all of the above examples we also believe that graphic decorations with cartoon or licensed characters should not have any bearing on whether products are considered toys that are subject to the phthalate requirements under section 108, regardless of the character used. We note that increasingly branded character licensing appeals to people in wide age ranges and not just children 12 years of age and younger. For example Mickey Mouse, Sponge Bob, Peanuts Characters and Sesame Street, Super Hero Characters have broad appeal across many age ranges. As noted above we believe the function of the product should be the primary factor determining whether the product is a toy version of the excluded products or not.

We also believe that the CPSC's previously issued FAQ's that indicated that traditional Halloween costumes should generally be considered wearing apparel, to the extent intended to be worn as festive, occasional attire subject to the Federal Flammable Fabrics Act ("FFA") was appropriate and should continue to be adhered to. Similarly apparel items that can be created by home crafters, knitters and sewers, from inherently excluded raw materials, in and of themselves, should not be considered children's products for sale or toys under section 108. These products are distinct in their use patterns from items used, packaged and marketed in dress up games.

We do recognize that there may be particular kits that include art materials or craft items that are generally recognized as "toys" because they are specifically packaged and marketed as such. We also believe separate categories of products should be considered separately from one another, although marketed together (For example a stuffed toy sold with a book should be evaluated separately from the book). Finally, it's essential that the CPSC adhere to the definition of toys that can be placed in a child's mouth, particularly for toys that are made from the interim restricted phthalates without protrusions less than 5cm in dimension that are not likely to be inserted in the mouth, chewed and sucked (but not licked) as required in the Act.

### **Toys That Can Be Placed in a Child's Mouth**

The CPSIA considers a toy to be a "toy that can be placed in a child's mouth" if "any part of the toy can actually be brought to the mouth and kept in the mouth...so that it can be sucked and chewed." In addition, if any part of the toy is less than 5 cm in any dimension, then it can be mouthed. Thus, if the manufacturer determines that an article is a "toy" under section 108 of the CPSIA, then the manufacturer must determine whether the toy can be mouthed. We urge the CPSC staff to harmonize with comparable determinations of the European Commission Enterprise and Industry Directorate General on such products. The 5 cm limitation found in Section 108(e)(2)(B) is borrowed directly from the European Commission's guidance, thus indicating that Congress was fully aware of the fact that Section 108 as drafted would be interpreted in a consistent manner when applied to larger inflatable toys.

### **Child Care Articles**

Section 108 of the CPSIA defines a “child care article” as “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.” While the law uses the word “facilitate,” it is not defined. The CPSC staff has indicated that according to *Webster’s Dictionary*, facilitate means to “to make easier.” As the staff began identifying products, it became clear that some products “facilitate” feeding, sleeping, sucking, or teething for the child directly, while other products “facilitate” those processes only indirectly, through the parent. The staff then considered the level of involvement or proximity of the child and product during the feeding, sleeping, sucking, or teething processes. The staff proposes that products used directly in the mouth by the child are primary products subject to the regulation. Products that have direct contact with the child, but may or may not have direct mouth contact, would also be considered primary products. CPSC staff has indicated that examples of such primary products are teethingers and pacifiers that go directly into the child’s mouth; a bib that is used during the feeding process (it helps protect the infant’s clothing, and it has direct contact with the infant). A bib is also used when infants are teething to keep their clothing dry. Because of the close proximity to the infant’s mouth and because infants explore their environment through mouthing, bibs can be expected to be chewed, sucked, and licked by infants, so they are considered primary products and would be subject to the regulation. Other examples of primary child care products might include: baby blanket, high chair, sipper cup, feeding bottle, and crib teething rail.

Another class of products to be considered includes consumer products that are not necessarily in direct physical contact with the child, but are in close proximity to the child, such as cribs, crib mattresses, toddler mattresses, mattress covers, or mattress pads. These products may or may not be considered to facilitate sleep.

Products that are used by the parent, but have no contact with the child, are considered secondary products and would not be subject to the regulation under the staff’s proposal. For example, a consumer may use a bottle warmer to prepare the bottle to feed the infant. While the bottle warmer “makes the process easier” for the adult feeding the infant, the bottle warmer and child have no interaction. Therefore, the staff considers the bottle warmer a secondary product. The staff proposes such secondary products to be outside the intended coverage of the law. Other examples of secondary child care articles might include: bottle cleaning products, breast pumps, nursing shield/pads, and highchair floor mats.

Another category of child care articles includes products that have multiple functions. Typically, these child care articles are larger products that offer parents/caregivers an alternative to holding their child, such as bouncers, swings, and some strollers. Any determination as to whether a particular product is a “child care article” as defined in section 108 of the CPSIA will be made after consideration of the following factors: Whether the intended use of the product is to facilitate sleeping, feeding, sucking, or teething, including a label on the product if such statement is reasonable; and whether the product is intended for use by children age 3 or younger.

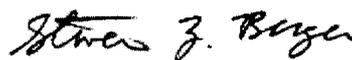
Based upon the foregoing rationale, we do not believe that there are any craft or hobby materials or products that in their “as sold” state could constitute a narrowly defined childcare product. We note that although room decorations, blankets, wraps, booties and other apparel items may all be created from raw materials by a crafts person, such products in and of themselves could not reasonably be considered as a primary product that facilitates, sleep, feeding, sucking or teething. Notwithstanding this, we recommend that the CPSC staff should extend such regulation only to such products that clearly facilitate such activities and that are actually marketed and sold to consumers in a finished state.

## **Conclusion**

With the exception of finished products, specifically designed, manufactured and marketed as toy products, almost all of the materials used for art material, craft and hobby activities are sold as raw materials for use by a broad range of the U.S. population (as opposed to sale for primary use by children 12 years of age or younger). Most craft activity is engaged in by people of all ages and rarely are such activities confined primarily to children 12 years of age or younger. In addition these products are generally not available for sale as finished toys or childcare products as defined under Section 108 of the CPSIA, or under ASTM F-963-07, simultaneously adopted under CPSIA as a mandatory toy safety standard. In addition instructional literature and craft books are not customarily defined as toys and should also be excluded. Indeed such standard generally excludes such art, craft and hobby materials from the

scope of such standard as a toy. Only finished products reasonably marketed and specifically and intentionally sold as toys or games should be considered a "toy" for the purposes of application of these requirements to craft products. Therefore, CHA urges the Commission to exclude art and craft materials from the scope of Section 108 requirements.

Best Regards,



Steven Z. Berger  
CEO  
Craft & Hobby Association  
[sberger@craftandhobby.org](mailto:sberger@craftandhobby.org)  
201-835-1215 direct



**Best Regards,  
Steve Berger  
CEO  
Craft & Hobby Association**

319 E 54th Street Elmwood Park NJ 07407  
Tel: (201) 835-1201  
(800) 822-0494  
Mobile: 908-256-0307  
Fax: (201) 835-1251



Please consider the environment before printing this e-mail

***Hope to see you at our upcoming CHA Shows:***

<b><i>CHA Summer Show - Orlando, FL</i></b>	<b><i>July 28 – 30, 2009</i></b>
<b><i>CHA Craft SuperShow - Orlando, FL</i></b>	<b><i>July 31 – August 1, 2009</i></b>
<b><i>CHA Winter Show - Anaheim, CA</i></b>	<b><i>January 24 – 27, 2010</i></b>

[www.chashow.org](http://www.chashow.org)

[www.craftandhobby.org](http://www.craftandhobby.org)

The information contained herein is confidential to the Craft & Hobby Association and is protected under trade secret law and the Copyright Act of 1976. Any misuse or misappropriation by unauthorized persons is prohibited and will violate civil and criminal law.

© 2009 Craft & Hobby Association. All rights reserved.

**Stevenson, Todd**

---

**From:** Ed Rogers [ed@fslures.com]  
**Sent:** Tuesday, March 24, 2009 12:07 PM  
**To:** Section 108 Definitions  
**Subject:** Notice of Availability of Draft Guidance Regarding Which Children's Products are Subject to the Requirements of CPSIA Section 108; Request for Comments and Information  
**Attachments:** CPSIA\_Section108\_Comment\_3-24-09.pdf; ATT00001.htm

Attached is our Comment.

Thank you.

Ed

Ed Rogers  
President  
FoodSource Lure Corporation  
3733 4th Terrace N  
Birmingham, AL USA  
205-451-0099 ext. 13 TEL  
205-451-0199 FAX  
866-375-8737 (866-FSLURES) TOLL FREE  
205-492-9925 CELL  
[www.fslures.com](http://www.fslures.com)  
[ed@fslures.com](mailto:ed@fslures.com)

**Notice of Availability of Draft Guidance Regarding Which Children's Products are  
Subject to the Requirements of CPSIA Section 108;  
Request for Comments and Information**



**Comment: Recreational Fishing Lures  
Made of Polyvinyl Chloride and Containing Phthalates  
Should Be Subject to the Requirements of CPSIA Section 108**



*"They do look like gummy worms and she kept trying to eat it."  
"My kids would try to eat them thinking they were gummy worms I bet!"  
"I think my two would chew them to death too!"*

*[www3.fertilethoughts.com/forums/showthread.php?  
t=573449&page=1&pp.-10t=573449&page=1&pp=10](http://www3.fertilethoughts.com/forums/showthread.php?t=573449&page=1&pp.-10t=573449&page=1&pp=10) (posted March  
11-13, 2008; last accessed March 24, 2009)*

Comment presented by:

Ed Rogers, President

FoodSource Lure Corporation, 3733 4th Terrace North, Birmingham, AL 35222  
(205) 451-0099, (205) 451-0199 fax, [ed@fslures.com](mailto:ed@fslures.com)

## I. INTRODUCTION

In light of the science showing that phthalates harm reproductive health, it is ironic if not tragic that the photo and comments shown above were found on a message board at a *fertility* website, *FertileThoughts.com*.

Soft, plastic, recreational fishing lures are made to resemble worms, minnows or other natural bait. These products often contain phthalates in concentrations of 50% or higher.

They are heavily marketed to children and sometimes even are given candy names and scents.

For the reasons stated in this Comment, these consumer products should be subject to the requirements of CPSIA Section 108.

## II. RECREATIONAL FISHING LURES AND PHTHALATES

Fishing is the most popular form of outdoor recreation in the United States. According to the U.S. Fish & Wildlife Service, there are 40 million anglers of all ages, including millions of children. More people fish than play golf and tennis combined. In an average year approximately 100 million bags of soft plastic fishing lures are sold in the U.S.

Soft plastic fishing lures typically are made from polyvinyl chloride ("PVC") plastisol. Plastisol normally is made of hard PVC resin, plastic softeners called phthalates, and stabilizers. Softness is a characteristic desired by anglers in plastic fishing lures. Therefore, phthalates -- such as DEHP phthalate -- usually are the primary ingredient in plastic fishing lures. For example, U.S. Patent No. 7,266,922 (Oelerich) describes a soft plastic fishing lure made up of 51%-66.6% DEHP. U.S. Patent No. 4,530,179 (Larew) describes a soft plastic fishing lure made up of 73% DEHP. There are many other examples. These amounts are more than 500 times the levels allowed by the CPSIA.

Some phthalates are considered reproductive toxins linked to a variety of health problems. These include (a) abnormal development of the reproductive system in boys; (b) deteriorated sperm quality in men; and (c) premature puberty in girls. *See* Swann, et al., "Decrease in Anogenital Distance among Male Infants with Prenatal Phthalate Exposure," *Environmental Health Perspectives*, August 2005, Vol. 113, No. 8; Hoppin, "Male Reproductive Effects of Phthalates: An Emerging Picture," *Epidemiology*, May 2003, Vol. 14, No. 3. The U.S. Centers for Disease Control says phthalates mimic estrogen and "*get rid of things that are in the testosterone line, the things that make a man a man.*" *USA Today*, August 2, 2005 (emphasis added).

Soft plastic fishing lures are the only PVC products that *by design* are routinely thrown

directly into and lost in our water resources, including sources of drinking water.<sup>1</sup>

Phthalate-laden fishing lures are not necessary for a robust recreational fishing industry. Competitively-priced alternatives to soft plastic fishing lures are readily available, including some made entirely of edible, FDA-approved animal feed ingredients.

### **III. SOFT PLASTIC FISHING LURES SHOULD BE CONSIDERED “CHILDREN’S TOYS” UNDER CPSIA, SECTION 108**

The CPSIA bans certain phthalates above trace amounts in children’s toys. Under the CPSIA, the term “children’s toy means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child *when the child plays*.” CPSIA, §108(e)(1)(B) (emphasis added).

The CPSC staff initially stated that the CPSC would broadly interpret the term “children’s toy”:

“‘children’s toy’ in section 108 of the CPSIA is defined broadly as a ‘consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child *when the child plays*.’ Therefore, any determination as to whether a particular sporting goods product would be a toy as defined under section 108, and therefore subject to the ban on phthalates, would be made on a case by case basis after consideration of [the age determination factors in §108(e)(2)(A)].”<sup>2</sup> [www.cpsc.gov/about/cpsia/faq/108faq.html#sportinggoods](http://www.cpsc.gov/about/cpsia/faq/108faq.html#sportinggoods) (last accessed December 29, 2008) (emphasis added).

However, the CPSC staff later said the CPSC may use the narrow definition of toy found in the ASTM F963-07 toy standard. That definition excludes sporting goods and is much narrower than the statutory language in §108(e)(1)(B).

At the CPSC’s March 12, 2009, public hearing, staff reported that they may look to the dictionary definitions of “play”:

---

<sup>1</sup> Most lures are lost or discarded in or around the water. Ingestion by fish and other wildlife leads to malnourishment or death. See Dr. Russell Danner (Maine Department of Inland Fisheries & Wildlife), et al., 2007, “Effects of Plastic Fishing Lures on Brook Trout Growth,” copy available at [www.fslures.com/document\\_uploads/37\\_Maine\\_Study](http://www.fslures.com/document_uploads/37_Maine_Study).

<sup>2</sup> The age determination factors include: “(i) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable[;] (ii) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children of the ages specified[; or] (iii) Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.” CPSIA, §108(e)(2)(A).

- “To occupy oneself in amusement, sport or other recreation; children playing with toys”
- “Recreational activity; especially: the spontaneous activity of children”
- “Exercise or activity for amusement or recreation”

Because “play” is not defined in the CPSIA, the CPSC is right to consult the plain dictionary definition. Using this authority, recreational fishing is “play” *by definition*. Therefore, soft plastic fishing lures are “children’s toys” under the plain reading of §108(e)(1) (B).

On the issue of the age determination factors in §108(e)(2)(A), many manufacturers actively market recreational fishing products, including soft plastic fishing lures, to children 12 and younger. For example, PRADCO, which bills itself as the “world’s largest manufacturer of plastic fishing lures,” specifically targets children and says “[y]outh recruitment is vital to our continued existence in the outdoor market,” [www.ebscoind.com/news-pob-boyscouts.asp](http://www.ebscoind.com/news-pob-boyscouts.asp). In addition, the specific mission of the Future Fisherman Foundation, [www.futurefisherman.org](http://www.futurefisherman.org), is to recruit children to the sport of fishing. The FFF is a project of the recreational fishing industry’s trade association, the American Sportfishing Association, [www.asafishing.org](http://www.asafishing.org).

It is worth noting that soft plastic fishing lures are small enough to be placed in a child’s mouth as determined by CPSIA, §108(e)(2)(B). In fact, because soft plastic fishing lures look like gummy worms, children are known to chew on them. Some manufacturers even give their soft plastic fishing lures names that sound edible, such as Mann’s Bait Company’s “jelly worms,” [www.manns bait.com/searchitems.asp?Searchfield=Jelly%20Worm&SC=Yes](http://www.manns bait.com/searchitems.asp?Searchfield=Jelly%20Worm&SC=Yes); the “Munchies” brand, [www.lindyfishingtackle.com/tackleshop2/home.php?cat=243](http://www.lindyfishingtackle.com/tackleshop2/home.php?cat=243); the “Yum” brand, [www.lurenet.com/catalog.aspx?catid=yum3x](http://www.lurenet.com/catalog.aspx?catid=yum3x); and Berkley PowerBait with colors such as “Watermelon Candy” and “Cotton Candy,” [www.berkley-fishing.com/prod.php?u=MPWA7](http://www.berkley-fishing.com/prod.php?u=MPWA7). In addition, many soft plastic lures taste salty because of added salt, are scented with anise (licorice), smell like pork or, in the case of NetBait’s “Salt Lick,” contain salt, anise *and* pork, [www.tacklewarehouse.com/descpage-NBSL.html](http://www.tacklewarehouse.com/descpage-NBSL.html). Coffee is another flavor added to soft plastic fishing lures, [www.strikeking.com/journal/00226/1.php](http://www.strikeking.com/journal/00226/1.php). The food names, tastes and smells are attractive to children and contribute to the habit of kids putting phthalate-heavy soft plastic fishing lures in their mouths.

#### IV. CONCLUSION

Because recreational fishing lures are used by children during recreation, and because recreation is essentially synonymous with “play,” recreational fishing lures made of polyvinyl chloride and containing phthalates should be subject to the requirements of CPSIA Section 108.

Comment presented by:

Ed Rogers, President, FoodSource Lure Corporation, 3733 4th Terrace North, Birmingham, AL 35222, (205) 451-0099, (205) 451-0199 fax, [ed@fslures.com](mailto:ed@fslures.com)